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090.017 Local Government Radio Service 1955
090.075(a) Business Radio Service 1955
090.631(e) Trunked systems loading, construction and authori 1948
097.301 Authorized frequency bands 1981
202.000 (a) lawfulness of new charges 2096
205.000 (a) Prescription 2088
205.000 (a) Prescription 2089
300.201 Service and Charges 1954
300.202(a) Discrimination and Preferences 2044
300.208 Complaints to the Commission 1954
300.208 Complaints to the Commission 1994
300.214 Extension of Lines 1927
300.214 Extension of Lines 1928
300.214 Extension of Lines 1929
300.214 Extension of Lines 1951
300.214 Extension of Lines 2094
300.214 Extension of Lines 2101
300.220 Accounts, Records, Memoranda, Depreciation Charges 1959
300.221 Special Provisions Relating to Telephone Companies 1982
300.224 Regulation of Pole Attachments 1912
300.309 Action Upon Application; Form of and Conditions atta 2047
300.314 Extension of Lines 2047
300.319 Construction Permits 2047
500.035 - Integration, Quantitative 1933
500.125 - Misrepresentation 1933
500.2065 Comparative Coverage 2062
500.2100 Abuse of process 2062
500.2125 Misrepresentation and lack of candor 2062
500.2155 Channel, spacing 2062
500.2170 Financial Qualifications 2057
500.2180 Site availability or suitablility 2062
500.3045 Diversification of Control of Mass Media 1960
500.3170 Financial Qualifications 1960

500.3170 Financial Qualifications 1967
500.3180 Site Availability 1960
Acceptable rate adjustment 2089
CC Dkt. No. 88-1; 47 C.F.R. § 204(a) Further Action by Comm 2150
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Part 74 - FM Broadcast Translator Stations 2106

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-110

In re Applications of

ANDERSON UNIVERSITY, INC. (hereafter "Anderson University") File No. BPH-880125ML

M. ALLEN GOUGH, INC. (hereafter "Gough") File No. BPH-880126MM

WILBER UMBERGER (hereafter "Umberger") File No. BPH-880126MT

For Construction Permit
for a New FM Station on
Channel 254A, Anderson, Indiana

HEARING DESIGNATION ORDER

Adopted: February 27, 1990; Released: March 26, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Gough.* Information before the Commission indicates that Gough was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

3. An identical three-fold issue was specified in each of the above proceedings: whether or not Sonrise was a real party-in-interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than litigate the potentially disqualifying character issue. This unresolved character issue calls into question Gough's qualification to be a Commission licensee. Therefore, since the issue remains unanswered, it will be specified and tried in this proceeding.

4. The applicants below have petitioned for leave to amend their applications of the dates shown. The accompanying amendments were filed after April 22, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Anderson University	October 19, 1988 (Engineering)
Gough	November 9, 1989; November 27, 1989

5. *Anderson University.* In an amendment filed on October 19, 1988, Anderson amended its application to specify a new transmitter site in order to resolve questions raised by the FAA with respect to its original site. In the amendment, Anderson proposes to side-mount its antenna on the existing tower currently utilized by WLHN(FM), Anderson, Indiana. In Section V-B, Items 7(a)(2) and 7(a)(3) of its application, Anderson lists the overall height above ground level (AGL) and above mean sea level (AMSL) of the WLHN(FM) tower indicate figures of 162.8 meters AGL and 426.7 meters AMSL, respectively. Because Anderson is proposing to locate on an existing tower, this slight discrepancy does not affect the acceptabilty of its amendment. Anderson will, however, be required to file an amendment correcting this discrepancy.

6. Anderson failed to provide a new site availability certification with its October 19, 1988 site change amendment. Accordingly, within 30 days of the release of this Order, Anderson will be required to file a site certification with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

7. *Petition to Deny.* On October 24, 1988, Anderson University, Inc. filed a petition to deny against Gough. The Commission's *Report and Order* in re *Revised Procedures for the Processing of Contested Broadcasting Applications: Amendment of Part I of the Commission's Rules*, 72 FCC 2d 202 (1979), directed the deletion of all issue pleadings in pending cases. Thus, ordinarily, we would not consider the matters sought to be raised in the petition. Rather, we would afford the party an opportunity to raise any allegations contained therein post-designation pursuant to Section 1.229. However, in light of our action in paragraphs 2 and 3 above, Anderson University's petition will be dismissed as moot.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR

HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a a subsequent Order upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Gough.

2. To determine whether Gough's organizational structure is a sham.

3. To determine, from evidence adduced pursuant to issues 1 and 2 above, whether Gough possesses the basic qualifications to be a licensee of the facilities sought herein.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in the light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That the Petitions for Leave to Amend filed by Anderson University and Gough ARE GRANTED and the corresponding amendments ARE ACCEPTED to the extent indicated above.

11. IT IS FURTHER ORDERED, That Anderson University shall file the corrective amendment specified in Paragraph 5 above with the presiding ALJ within 30 days of the release of this Order.

12. IT IS FURTHER ORDERED, That Anderson shall submit a site certification amendment to the presiding Administrative Law Judge within 30 days of the release of this Order.

13. IT IS FURTHER ORDERED, That the Petition to Deny filed by Anderson University, Inc. on October 24, 1988 IS DISMISSED as moot.

14. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

16. IT IS FURTHER ORDERED, That the applicants herein shall pursuant to Section 311 (a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-111

In re Applications of

JONATHAN LEE LEVEEN (hereafter "LeVeen")	File No. BPH-880208MI
CENTRAL RADIO COMMUNICATIONS, INC. (hereafter "Central")	File No. BPH-880208MJ
DONNA LEE KNAUER (hereafter "Knauer")	File No. BPH-880208MN
MONHEGAN BROADCASTING COMPANY (hereafter "Monhegan")	File No. BPH-880208MO

For Construction Permit
for a New FM Station on
Channel 295B (106.9 MHz)
in Thomaston, Maine

HEARING DESIGNATION ORDER

Adopted: February 27, 1990; Released: March 26, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Central has not completed Item 4 correctly. Central's application does not list the applicant and the other required information pertaining to the applicant. Accordingly, Central must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

3. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicants below have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by Central and Knauer would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

4. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last day for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed:

APPLICANTS	DATE AMENDMENTS FILED
LeVeen	August 7, 1989
Central	April 28, 1988, May 13, 1988; March 6, 1989
Monhegen	September 16, 1988; February 14, 1989; June 20, 1989

5. Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Central and Knauer would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, Thata Central shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

9. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

10. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by LeVeen, Central, and Monhegen ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the

Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-109

In re Applications of:

BOTT BROADCASTING COMPANY (hereafter Bott)	File No. BPH-880421MB
PAMELA R. JONES (hereafter Jones)	File No. BPH-880421MR
EDGEWATER RADIO, INC. (hereafter Edgewater)	File No. BPH-880421MU
FORT WAYNE BROADCAST PARTNERSHIP (hereafter Partnership)	File No. BPH-880421NA
STEVE A. MILLER (hereafter Miller)	File No. BPH-880421NO
FT. WAYNE BROADCASTING CO., INC. (hereafter FWBC)	File No. BPH-880421NV
WRIGHT COMMUNICATIONS OF FT. WAYNE, INC. (hereafter Wright)	File No. BPH-880421NY

For Construction Permit for a
New FM Station on Channel 222A,
Fort Wayne, Indiana

HEARING DESIGNATION ORDER

Adopted: February 27, 1990; Released: March 26, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Partnership.* Information before the Commission indicates that Partnership was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party in interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question Partnership's qualification to be a Commission licensee. Therefore, such issues will be specified and tried against Partnership in this proceeding.

3. Item 5 of Section II, FCC Form 301 (October 1986), requires applicants to indicate if the applicant or any party to it has or has had an application dismissed with prejudice by the Commission, had an application denied by the Commission, or has an interest in "a broadcast application in any pending or concluded Commission proceeding which left unresolved character issues against the application." If answered in the affirmative, the applicant is to provide the name of the party having an interest, the nature of the interest or connection and dates, the call letters or file number of the application or docket number, and the location. Partnership has responded to Items 5(b), (c) and (e) in the negative. However, Commission records indicate that various general partners of Partnership have had applications dismissed by the Commission, applications denied by the Commission, and applications which have left unresolved character issues against the application. For example, partner Darrell Hatley has an interest in applications filed in both Rocky Mount, NC and Greenwood, IN. Both of those applications have been dismissed by the Commission but Partnership has failed to amend accordingly. Likewise, Mr. Hatley has an interest in applications in Des Moines, IA and Albuquerque, NM and Partnership has failed to report the unresolved character issues added in those proceedings pursuant to 47 C.F.R. § 1.65. Accordingly, an appropriate issue will be specified below.

4. *Other Matters.* The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Jones	March 14, 1989
Edgewater	July 3, 1989

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Partnership.

2. To determine whether Partnership's organizational structure is a sham.

3. To determine whether Partnership violated Section 1.65 of the Commission's Rules, and/or lacked candor, by failing to report the designation of character issues against other applicants in which one or more of its partners has an ownership interest and/or the dismissal of such ownership interest and/or the dismissal of such applications with unresolved character issues pending.

4. To determine, from the evidence adduced pursuant to Issues 1 through 3 above, whether Partnership possesses the basic qualifications to be a licensee of the facilities sought herein.

5. To determine which of the proposals would, on a comparative basis, best serve the public interest.

6. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Jones and Edgewater ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

8. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

9. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-412

In the Matter of

Amendment of Section 73.202(b), RM-6735
Table of Allotments,
FM Broadcast Stations.
(Rayville, Louisiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 13, 1990; Released: March 26, 1990

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 6985 (1989), issued in response to a petition filed by Delta Communications, Ltd. (petitioner), licensee of Station KTJC(FM), Rayville, Louisiana. Petitioner proposed the substitution of FM Channel 222C2 for Channel 222A at Rayville, Louisiana, and modification of its license to specify the higher class channel.[1] Petitioner filed comments in which it reaffirmed its interest in Channel 222C2. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 222C2 for 221A at Rayville, Louisiana, since it could provide the community with its first wide coverage area FM station. The substitution can be made in compliance with the minimum distance separation requirements of the Commission's Rules at the site specified by petitioner.[2] In addition, we have authorized a modification of the petitioner's license for Station KTJC(FM), Rayville, Louisiana, to specify operation on Channel 222C2 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 10, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Rayville, Louisiana	222C2

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KTJC(FM), Rayville, Louisiana, IS MODIFIED TO SPECIFY operation on Channel 222C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] A *Report and Order* in MM Docket 88-532, 4 FCC Rcd 6693 (1989), modified the license for Station KTJC(FM), Rayville, Louisiana, to specify operation on Channel 222A in lieu of Channel 221A.

[2] The coordinates for Channel 222C2 are 32-14-15 and 91-33-50.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-41

In the Matter of

Amendment of Section 73.202(b), RM-6550
Table of Allotments,
FM Broadcast Stations.
(Oskaloosa and Perry, Iowa)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 13, 1990; Released: March 26, 1990

By the Chief, Allocations Branch:

1. At the request of Jomast Corporation (petitioner), the Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause*, 4 FCC Rcd 1805 (1989), proposing the substitution of Channel 285C2 for Channel 285A at Oskaloosa, Iowa, and the modification of its license for Station KOSK(FM) to operate on the higher powered channel. In order to comply with the Commission's minimum distance separation requirements, an *Order to Show Cause* was issued to Perry Broadcasting Company ("Perry Broadcasting") as to why its license for Station KDLS, Perry, Iowa, should not be modified to specify operation on Channel 287A in lieu of its presently allotted Channel 285A. Petitioner filed comments reiterating its intention to apply for Channel 285C2, if allotted to Oskaloosa, and to reimburse Perry Broadcasting for the reasonable costs associated with the change of Station KDLS' operating channel. Perry Broadcasting did not file comments and is therefore deemed to have consented to the modification of its license.

2. Upon further review of this proposal, we find that the allotment of Channel 287A to Perry impacts two other proceedings. First, Channel 287A at Perry conflicts with the proposed allotment of Channel 287C2 to Chariton, Iowa, filed by Dwaine F. Meyer as a counterproposal in MM Docket 89-264, 4 FCC Rcd 4904 (1989), since the two communities are located only 110 kilometers apart instead of the 163 kilometers required for co-channel Class A and C2 allotments. However, there was no need to consider the Chariton proposal as an untimely counterproposal in this proceeding since Meyer also requested the substitution of Channel 290A for Channel 285A at Perry, thus removing any conflict between the two proposals. Second, just prior to the submission of Meyer's Chariton proposal, Twin Lakes Broadcasting, Inc. requested the substitution of Channel 290C3 for Channel 288A at Twin Lakes, Iowa (MM Docket 89-369, 4 FCC Rcd 6630 (1989)). Channel 290C3 at Twin Lakes conflicts with the allotment of Channel 290A to Perry, as the communities are located less than the required minimum distance separation of 138 kilometers for co-channel Class A and C3 allotments. However, the staff has performed a channel search and found that Channel 269A can be allotted to Perry in compliance with the Commission's minimum distance separation requirements and can be used at the present transmitter site of Station KDLS.[1] The allotment of Channel 269A removes any conflict between the Oskaloosa, Chariton and Twin Lakes proposals. Therefore, we will substitute Channel 269A for Channel 285A at Perry, and modify the license of Station KDLS accordingly.

3. Channel 285C2 can be allotted to Oskaloosa in compliance with the Commission's minimum distance separation requirements and can be used at Station KOSK(FM)'s present transmitter site.[2] As proposed, we will also modify the license of Station KOSK(FM) to specify operation on Channel 285C2.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 10, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Oskaloosa, Iowa	285C2
Perry, Iowa	269A

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Jomast Corporation for Station KOSK(FM), Oskaloosa, Iowa, IS MODIFIED to specify operation on Channel 285C2, in lieu of Channel 285A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KDLS, Perry, Iowa, IS MODIFIED to specify operation on Channel 269A in lieu of Channel 285A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station KDLS's license, BLH-5066, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-5066, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

7. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensee of Station KDLS, as follows: Perry Broadcasting Company, P.O. Box 548, Perry, Iowa 50220.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The coordinates for Channel 269A at Perry are North Latitude 41-49-58 and West Longitude 94-02-15.

[2] The coordinates for Channel 285C2 at Oskaloosa are North Latitude 41-19-15 and West Longitude 92-38-44.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-164

In the Matter of

Amendment of Section 73.202(b),	RM-6814
Table of Allotments,	RM-6926
FM Broadcast Stations.	
(St. Augustine and St. Augustine Beach, Florida)	

NOTICE OF PROPOSED RULE MAKING

Adopted: March 12, 1990; Released: March 26, 1990

By the Chief, Allocations Branch:

1. The Commission has before it for consideration two separately filed conflicting petitions for rule making. The first, filed by Kyle E. Magrill ("Magrill"), requests the allotment of Channel 231A to St. Augustine Beach, Florida, as the community's first local service. The second, filed by First City Broadcasting, Inc. ("First City"), licensee of Station WSOS(FM), St. Augustine, Florida, requests the substitution of either Channel 288C3 or 231C3 for Channel 288A at St. Augustine, Florida, and modification of First City's license to specify operation on 288C3 or 231C3. In order to accommodate the upgrade on Channel 288C3, the substitution of Channel 287A for Channel 288A at Gainesville, Florida, for Station WYKS(FM), would be necessary.[1] Magrill and First City each state an intention to apply for the respective channel, if allotted.

2. In support of its proposal to substitute Channel 231C3 for Channel 288A at St. Augustine, First City states that Channel 231C3 can be allotted to St. Augustine at its existing transmitter site, which would eliminate the need for a change of site, while also eliminating the need to substitute Channel 287A for Channel 288A for Station WYKS, at Gainesville, Florida.

3. An engineering analysis has determined that Channel 231A can be allotted to St. Augustine Beach in compliance with the minimum distance separation requirements of the Commission's Rules with a site restriction of 9.8 kilometers (6.1 miles) north.[2] Channel 231C3 can be allotted to St. Augustine at First City's existing transmitter site in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.6 kilometers (4.7 miles) West-Northwest.[3]

4. In view of the fact that St. Augustine Beach, Florida, could receive its first local FM channel, or St. Augustine could receive a wide coverage area service, the Commission believes it would be in the public interest to seek comments on the alternative proposals. In order to make a determination as to which proposal would better serve the public interest, we shall provide each proponent with an opportunity to demonstrate in comments to the *Notice* why its community should receive the allotment. In this regard, the parties should be guided by the criteria set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). It should be noted that the Commission generally favors a first local service over an upgrade in facilities for an existing station.

5. As requested, we shall propose to modify the licensee of Station WSOS(FM) to specify operation on Channel 231C3 at St. Augustine, Florida. However, in accordance with Section 1.420 of the Commission's Rules, Station WSOS(FM)'s license may not be modified herein to specify non-adjacent Channel 231C3, since there is a competing expression of interest.

6. Accordingly, we seek comments on the alternative proposals to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
St. Augustine Beach, Florida	--	231A
St. Augustine, Florida	288A	231C3

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **May 17, 1990,** and reply comments on or before **June 1, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Kyle E. Magrill
P. O. Box 456
Orange Lake, 32681
Florida

John F. Garziglia
Pepper & Corazzini
1776 K Street, N.W.,
Suite 200
Washington, D.C. 20006
(Attorney for First City Broadcasting, Inc.)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction

of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] First City's proposal to substitute Channel 288C3 at St. Augustine is unacceptable, because it requires the substitution of Channel 287A for Channel 288A at Gainesville, Florida, and Channel 287A at Gainesville is short-spaced by 1.8 kilometers to the licensed site of Station WYOC(FM), Channel 285A at High Springs, Florida.

[2] The coordinates for Channel 231A at St. Augustine Beach, Florida, are North Latitude 29-55-37 and West Longitude 81-18-06.

[3] The coordinates for Channel 231C3 at St. Augustine, Florida, are North Latitude 29-55-05 and West Longitude 81-23-26.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-235

In the Matter of

Amendment of Section 73.202(b), RM-6279
Table of Allotments,
FM Broadcast Stations.
(Corcoran, Kernville and
Mendota, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 12, 1990; Released: March 26, 1990

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making and Order to Show Cause*, 3 FCC Rcd 3121 (1988), issued in response to a petition for rule making filed on behalf of Radio Corcoran, Inc., permittee of Station KLCZ(FM), Channel 272A, Corcoran, California, proposing the substitution of Channel 272B1 for Channel 272A and modification of its permit accordingly. In order to accomplish the Corcoran modification in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, two additional changes were proposed. Specifically, Channel 273A was proposed as a substitute for Channel 272A at Kernville, California, with a modification of the license issued to Kern Valley Broadcasting Co., Inc., for Station KKRV(FM), Channel 272A, to specify the proposed Class A channel. Channel 263A was proposed as a substitute for Channel 272A at Mendota, California, as Option I,[1] or alternatively, it was proposed to delete Channel 272A at Mendota, without replacement, as Option II.[2] An *Order to Show Cause* was issued to Kern Valley Broadcasting Co., Inc. ("Kern"), directing it to show cause why its license for Station KKRV(FM) should not be modified to specify operation on Channel 273A in lieu of Channel 272A at Kernville. Petitioner filed supporting comments as well as additional comments.[3]

2. We believe the public interest would be served by substituting Channel 272B1 for Channel 272A at Corcoran since it could enable Station KLCZ(FM) to expand its coverage area. Kern did not file comments concerning the proposed modification of its license for Station KKRV(FM) at Kernville, and thus, is deemed to have consented to the modification. Since there is no acceptable application on file for Channel 272A at Mendota, California, and since we received no expression of interest in the proposed substitution of Channel 263A, we believe the public interest would be served by adopting Option II of the *Notice*.

3. As indicated in the *Notice*, Channel 272B1 can be substituted for Channel 272A at Corcoran consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is located at least 15.8 kilometers east[4] of the community. Channel 273A can be substituted for Channel 272A at Kernville at the present site of Station KKRV-FM.[5]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 10, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with regard to the communities listed below, as follows:

City	Channel No.
Corcoran, California	272B1
Kernville, California	273A
Mendota, California	---

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the permit of Radio Corcoran, Inc. for Station KLCZ(FM), IS MODIFIED effective **May 10, 1990,** to specify operation on Channel 272B1 in lieu of Channel 272A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Kern Valley Broadcasting Co., Inc. for Station KKRV(FM), Kernville, California, IS MODIFIED effective **May 10, 1990** to specify operation on Channel 273A in lieu of Channel 272A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station KKRV(FM)'s license BLH-851206KB, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules PROVIDED the transmission facilities comply in all respects with license BLH-851206KB, except for the

channel as specified above, and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Option I was contingent upon the issuance of a license to cover the construction permit for a change in transmitter location of Station KFIG-FM, Channel 266B, Fresno, California, at coordinates 36-55-48 and 119-38-27. *See* File No. BMPH-871228IC. The *Notice* also advised that in the event Station KFIG-FM's application was not granted, we would propose as Option II to delete Channel 272A at Mendota, allotted in MM Docket No. 84-231, since no applications were received therefor during the open window filing period. *See* footnote 2, *infra*.

[2] Although the filing window for Channel 272A at Mendota closed without any interest having been expressed, an application was subsequently received (File No. 881021ME), but thereafter returned by staff action of January 31, 1990.

[3] Petitioner's additional comments were not accompanied by a motion to accept, but were served on the parties to this proceeding. Since they merely advise us of the status of Station KFIG-FM's license application, of which we would take official notice, no prejudice to any party will result from their acceptance.

[4] Coordinates for Channel 272B1 at Corcoran are 36-06-33 and 119-22-55.

[5] Coordinates at the present site of Station KKRV(FM) are 35-37-21 and 118-26-16.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-86

In the Matter of

Amendment of Section 73.202(b), RM-6604
Table of Allotments,
FM Broadcast Stations.
(San Rafael, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 12, 1990; Released: March 26, 1990

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 4 FCC Rcd 3727 (1989), proposing the substitution of FM Channel 264A for Channel 265A at San Rafael, California, and modification of the license of Marin Broadcasting, Company, Inc. (petitioner) for Station KTID-FM. Petitioner filed supporting comments. No other comments were received.

2. As stated in the *Notice*, petitioner's proposal is premised on a desire to eliminate adjacent channel interference within the primary service area at its present site,[1] created by grandfathered short-spaced second adjacent Station KIOI(FM), Channel 267B, San Francisco, California.[2] Petitioner stated that the substitution of channels at San Rafael would permit it to relocate the station's transmitter to a superior site on San Pedro Mountain,[3] at a location which is 0.6 kilometers further removed from Station KIOI's present transmitting location than is the present KTID site. In this manner, petitioner claimed that a reduction in signal interaction would occur. In further support of its proposal, petitioner asserted that Station KTID-FM experiences substantial shadowing within its coverage area at its present site due to the mountainous terrain surrounding its transmitter. Petitioner claimed that its proposal would provide public interest benefits by enabling it to improve line of sight coverage over its service area.

3. In view of the above, we believe the public interest would be served by the substitution of channels at San Rafael, to allow KTID-FM to improve its signal quality and relocate to its preferred site. As indicated in the *Notice*, Channel 264A can be allotted to San Rafael in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules at the petitioner's preferred site. Therefore, and in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying the license of Station KTID-FM to specify operation on Channel 264A in lieu of Channel 265A at San Rafael.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 10, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, to read as follows:

City	Channel No.
San Rafael, California	264A

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Marin Broadcastsing Company, Inc. for Station KTID-FM, IS MODIFIED effective **May 10, 1990,** to specify operation on Channel 264A in lieu of Channel 265A, at San Rafael, California, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in license BLH-7305 except the channel as specified above. Any other changes, except those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, provided the transmission facilities comply in all respects with license BLH-7305 except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Coordinates at the present site of Station KTID-FM are 37-58-49 and 122-31-39.

[2] Station KIOI(FM) operates with 61 kW ERP at 338 meters (1110 feet) HAAT. Coordinates at the licensed site of Station KIOI(FM) are 37-41-24 and 122-26-13.

[3] Coordinates at the proposed site for Station KTID-FM are 37-59-25 and 122-29-58. As stated in the *Notice*, petitioner advised that it was not possible to operate Station KTID-FM on Channel 265A at the proposed site since it would be 1.3 kilometers short-spaced to Station KYBB(FM), Channel 265A, Tracy, California, at coordinates 37-46-52 and 121-21-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-301

Amendment of Section 73.202(b),	RM-6672
Table of Allotments,	RM-6736
FM Broadcast Stations	
(Carthage and Webb City,	
Missouri)	

ERRATUM

Released: March 26, 1990

By the Chief, Allocations Branch:

1. On March 2, 1990, the Commission released the *Report and Order,* DA 90-257, in the above captioned proceeding. In the *Order,* at paragraph 6, Station KRGK(FM), Carthage, Missouri, is modified to Channel 285A. The channel was incorrect. Paragraph 6 is hereby corrected to show Station KRGK(FM), Carthage, Missouri, modified to Channel 236C2.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Mass Media Bureau
Policy & Rules Division

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-84

In re Applications of

RADIO REPRESENTATIVES, INC. (hereafter "Radio")	File No. BPH-870910MD
GENE A. FOLDEN BROADCASTING OF HONOLULU, INC. (hereafter "Folden")	File No. BPH-870910MQ
MAHALOCOLO, LTD. (hereafter "Mahalocolo")	File No. BPH-870910MV
KASA MOKU KA PAWA BROADCASTING, INC. (hereafter "Kasa Moku")	File No. BPH-870910MZ
DANIEL AND DENISE LAMAUTE (hereafter "Lamaute")	File No. BPH-870910NF
JEAN YANG (hereafter "Yang")	File No. BPH-870910NM
(John Dean and Zoe Hazen d/b/a) HAZEN COMMUNICATIONS (hereafter "Hazen")	File No. BPH-870910NN
SANTEE BROADCASTING, INC. (hereafter "Santee")	File No. BPH-870910NP
LA KIO O KA PO'E HAWAII NEI (hereafter "La Kio")	File No. BPH-870910NU
HONOLULU FM LIMITED PARTNERSHIP (hereafter "Partnership")	File No. BPH-870910NZ
PACIFIC TROPICAL BROADCASTING, INC. (hereafter "Tropical")	File No. BPH-870910OF
ECHONET CORPORATION (hereafter "Echonet")	File No. BPH-870910MX (PREVIOUSLY DISMISSED)

For Construction Permit for a
New FM Station on Channel 290C
(105.9 MHz) in Honolulu, Hawaii

HEARING DESIGNATION ORDER

Adopted: February 16, 1990; Released: March 26, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matter.* On December 1, 1988, Echonet's request for waiver of 47 C.F.R. § 73.211(a)(2) to permit an antenna height above average terrain of minus 60 meters was denied and its application returned as unacceptable for filing. On December 29, 1988, Echonet petitioned for reconsideration of this action. In its pleading, Echonet alleges that site locations specified by the other applicants near the Commission's Waipahu Monitoring Station are "unsuitable" because of the potential interference to that facility. Echonet also claims that sites north of downtown Honolulu are unavailable since Echonet "was informed by the Department of Land and Natural Resources, the Bishop Estate, and existing broadcasters through which a site location was sought that no new radio facility construction would be approved for this area by Honolulu zoning authorities." *Petition for Reconsideration*, at page 4. Further, Echonet argues that grant of its requested waiver would serve the public interest "by having as many qualified applicants as possible from which to choose."

3. Echonet's arguments fail, both on grounds of unsuitability and unavailability. As noted in paragraphs 11 and 24 below, the Commission will not dismiss applications that may pose an interference threat to its Waipahu operations. Instead, the Commission requires that the eventual permittee satisfy a specific condition regarding field intensity and corrective actions should such interference become a reality. Further, Echonet has offered no documentation that any applicant will be unable to obtain approval of its plans from the concerned local authorities. *Warren Price Communications, Inc.*, 2 FCC Rcd 4201, 4202 (1987); *Teton Broadcasting Limited Partnership*, 1 FCC Rcd 518, 519 (1986). Finally, the Commission's preference for "as many qualified applicants as possible from which to select a broadcast licensee" was tempered by MM Docket 84-750's processing revisions to produce an emphasis on "providing service to the public in the most efficient, expeditious manner possible." *See, e.g., James C. Rogers*, 2 FCC Rcd 5536, 5537 (1987). In this regard, the Commission has stated that "[t]emporizing with applicants' flawed proposals or procedural failures has in the past disserved the public interest by inordinately delaying the initiation of new service." *See Star Signal Corporation*, 1 FCC Rcd 450, 451 (1986); *See also, Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986). Therefore, Echonet's petition for reconsideration will be denied.

4. *Mahalocolo.* The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Mahalocolo filed a statement, it failed to list a minority organization it proposed to utilize to attract job applicants. Accordingly, Mahalocolo will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

5. *Partnership.* Information before the Commission indicates that Partnership was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Oliver Springs, Tennessee	88-201
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

An identical three-fold issue was specified in each of the above proceedings: whether or not Sonrise was a real party in interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than litigate the potentially disqualifying character issue. This unresolved character issue calls into question Partnership's qualifications to be a Commission licensee. Therefore, since the issue remains unanswered, it will be specified and tried in this proceeding.[1]

6. Item 5(a) of Section II, FCC Form 301 (October 1986) requires applicants to indicate if the applicant or any party to it has or has had an interest in "a broadcast application pending before the Commission." If answered in the affirmative, the applicant must provide the name of the party having an interest, the nature of the interest or connection and dates, the call letters or file number of the application or docket number, and the location.

7. Although Partnership responded to Item 5(a) in the affirmative, it neglected to indicate that Vernon E. Thomas has a 3.3% interest in Trussville, Alabama applicant Lawson Communications, Inc. (File No. BPH-880519MK). Since Partnership failed to amend its application to report this holding pursuant to Section 1.65, an appropriate issue will be specified below.

8. Commission records indicate that Partnership principals Eugene White, Ralph Savage, and Charles D. McFall were named in the post-designation specification of an abuse-of-process issue in *National Communications Industries*, MM Docket No. 88-577 (FCC 89M-1028, released March 31, 1989).[2] In its entirety, that issue reads:

> To determine whether Eugene White, Ralph Savage, Charles D. McFall, and/or Sonrise have abused the Commission's processes by manufacturing, selling and filing multiple applications, not controlled by the persons nominally shown to be in control of such applications, and if so, what impact that has on BBI's (Biltmore Broadcasting Inc.) basic qualifications to be a Commission licensee.

Since that proceeding for a construction permit to serve Biltmore Forest, North Carolina is pending as of the designation of this matter, any grant of Partnership's application is conditioned upon the Commission's determination in the Biltmore Forest proceeding.

9. *Environmental.* Our engineering study indicates that the proposals of Radio, Folden, Mahalocolo, Kasa Moku, Yang, Hazen, La Kio and Partnership may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that each may fail to comply with environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in the 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since the proposals of the applicants listed above may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, each will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. Accordingly, Radio, Folden, Mahalocolo, Kasa Moku, Yang, Hazen, La Kio and Partnership will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

10. *Air Hazard.* In its determination of hazard to air navigation (Aeronautical Study No. 88-AWP-790-OE, dated July 12, 1989), the Federal Aviation Administration determined that Santee's proposed structure would produce "serious frequency inter-modulation interference" to FAA air navigation facilities. Further, the FAA stated that its analysis predicts that "interference to some portion of the airspace to be protected *if the proposed*

transmitter is placed anywhere on the Island of Oahu " (emphasis added). Therefore, an air hazard issue will be specified against each of the captioned applicants.

11. *Interference to the FCC Waipahu Office*. The Commission's Field Operations Bureau has indicated that the facilities proposed by Radio, Folden, Mahalocolo, Kasa Moku, Lamaute, Yang, Hazen, Santee, La Kio, Partnership and Tropical may, if constructed, cause objectionable interference to the FCC's Waipahu monitoring station. However, the Bureau has further indicated that it will not oppose favorable action on the applications provided an appropriate, protective condition is, in the event of grant, attached to the pertinent construction permit at the conclusion of this proceeding. Accordingly, an appropriate condition will so be attached.

12. *Section 73.316(c)*. Santee and La Kio both propose to operate with directional antenna patterns exceeding the 15 dB maximum-to-minimum ratio limitation of 47 C.F.R. § 73.316(b)(1) and the maximum variance of 2 dB per 10 degrees of azimuth required by 47 C.F.R. § 73.316(b)(2). Waiver of these rule sections have been requested to allow operation with the proposed patterns. In support of their respective waiver requests, Santee and La Kio note that the Commission's Waipahu Monitoring Station and FAA facilities must be protected. These waivers have been routinely granted in the past in order to protect our monitoring facilities, and therefore grant in this case is also warranted in the public interest.

13. *Petition to Deny*. On January 30, 1989, Folden petitioned to dismiss or deny Yang's application, alleging that Yang violated the provision in 47 C.F.R. § 73.3520 --the Commission's multiple application rule--prohibiting, in pertinent part, the filing by the same applicant of an application for a station of the same class to serve the same community. Specifically, Folden noted that Yang's immediate application was filed September 10, 1987 while her application as 100% owner of Radio Pacific, Inc. (BPH-841114MH) for another Honolulu FM channel (286C) was pending before the Commission.[3] Folden argues that since Yang "did not request a waiver of this rule section . . . the second filed application was patently in violation of the Rules, and must be dismissed as defective." *Petition*, at page 2.

14. In her opposition filed February 13, 1989, Yang cited the Bureau's policy that "inconsistent applications will not be . . . dismissed when, at the time of filing, the applicant makes the unequivocal statement that its earlier filed application is being or will be dismissed in the near future."[4] Further, Yang claims that 47 C.F.R. § 73.3518 "is the operative [section] here since Radio Pacific, Inc. and Jean Yang are not 'the same applicant' as defined in Rule 73.3520." *Opposition*, at footnote 6. Folden disputes this claim in his February 24, 1989 reply, arguing that: (i) the inconsistent application rule (§ 73.3518) "is irrelevant" to Yang's multiple applications; (ii) that "the Commission is simply not allowed to carve out wholesale exceptions to the express prohibitions of its rules without following the requirements of amending those rules pursuant to the Administrative Procedures Act;" and (iii) Yang's instant application violates the provisions of 47 C.F.R. § 73.3519, which prohibit applicants from filing for a similar facility for 12 months after a prior application was dismissed with prejudice. *Reply*, at pages 4-5.

15. The District of Columbia Court, in a recent line of cases here controlling, clarified and reaffirmed the Commission's statutorily prescribed two-step process for judging the sufficiency of a petition to deny. Consequently, it is well established that in order to obtain an evidentiary hearing, the petitioner must first set forth specific allegations of fact sufficient to show that "a grant of the application would be *prima facie* inconsistent with the public interest, convenience and necessity." 47 U.S.C. § 309(d)(1).[5] Second, if the petition meets these requirements, then and only then, the Commission must determine whether "on the basis of the application, the pleadings filed, or other matters which the Commission may officially notice, a substantial and material question of fact is presented." 47 U.S.C. § 309(d)(2). If not, no evidentiary hearing need be held. *Citizens for Jazz on WRVR, supra*, at 394.

16. While we agree that Folden's allegation establishes an apparent violation of Section 73.3520, we are not persuaded that this assumed rule violation, standing alone, is sufficient to establish that an eventual grant of Yang's referenced application would be *prima facie* inconsistent with the public interest, convenience and necessity.[6] *See e.g., Banks Broadcasting Company*, FCC 85-122, Slip. op. (rel. April 4, 1985, adopted March 14, 1985); *Kist Corporation*, 99 FCC 2d 173 (1984); *Julie P. Minor (KDXU)*, 51 FCC 2d 1163 (Rev. Bd. 1975). *See also, Catoctin Broadcasting Corporation of New York*, 2 FCC Rcd 2126, 2137 (Rev. Bd. 1987). The prohibition against the filing of multiple applications reflects the Commission's long-standing concern "that the necessity of processing and hearing applications which cannot all be granted because of the limits of the multiple ownership rules may waste the Commission's resources, unfairly prejudice other applicants, and delay service to the public." *Comark Television, Inc.*, 51 RR 2d 738, 743 (1982), referencing *WSTV, Inc.*, 43 FCC 1254, 1256 (1953). This rationale is nearly identical to the Commission's intent that its inconsistent/conflicting application rule "expedite [the Commission's] application processing procedures by avoiding the disruption of having two inconsistent applications contemporaneously being studied by the staff" when only one can be granted. *See KKAP Broadcasting Co.*, 63 FCC 2d 235, 236 (1976). Since the joint request to dismiss Yang's Radio Pacific application was filed prior to tender of the referenced application and the applicant specifically noted her unequivocal statement of dismissal of the 1984 application, an exception can be similarly made in these circumstances for the acceptance of her 1987 application to serve Honolulu on Channel 290C.[7] Contrary to Folden's assertion that such an action represents a "wholesale" exception in defiance of the *Administrative Procedures Act*, this approach is a prime example of the proposition that the Commission's "discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances." *WAIT Radio v FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).[8] This "safety valve" option has been found "valid" in those situations where a general rule is "extended to an applicant who proposes a new service that will not undermine the policy, served by the rule, that has been adjudged in the public interest." *Id.*

17. *Section II, Item 4*. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Neither Radio nor Partnership have completed Item 4 correctly. Radio's application provides a post office box for the applicant's address;

Partnership's application gives a post office box number as the residence address for limited partners Mr. and Mrs. Alfred S. Wester, Sr. Accordingly, both will be required to submit an amendment giving all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

18. *Late-filed Amendments*. The applicants listed below petitioned for leave to amend their applications, and filed their accompanying amendments after November 23, 1987, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	DATE FILED
Radio	March 4, June 2, June 6 and July 11, 1988
Folden	April 20, 1988; January 25, 1990
Hazen	February 9, 1988 and February 21, 1989
Santee	September 6 (Engineering) and September 15, 1988; June 8 and October 11, 1989[9]
Partnership	May 16 and October 27, 1988; May 31 and June 20, 1989
Tropical	January 27, 1988; April 7, 1989 (Engineering)

19. *Area & Populations*. Data submitted by the applicants indicate there would be significant difference in the size of the areas which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

20. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

21. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party-in-interest to Partnership's application.

2. To determine whether Partnership's organizational structure is a sham.

3. To determine whether Partnership violated Section 1.65 of the Commission's Rules, and/or lacked candor, by failing to report the interest held by one of its partners in an application pending before the Commission.

4. To determine, from the evidence adduced pursuant to Issues 1 through 3 above, whether Partnership possesses the basic qualifications to be a licensee of the facilities sought herein.

5. If a final environmental impact statement is issued with respect to Radio, Folden, Mahalocolo, Kasa Moku, Yang, Hazen, La Kio and/or Partnership in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

6. To determine whether there is a reasonable possibility that the tower heights, locations and/or frequency proposed by the applicants in this proceeding would constitute a hazard to air navigation.

7. To determine which of the proposals would, on a comparative basis, best serve the public interest.

8. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

22. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Echonet IS DENIED.

23. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Mahalocolo shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

24. IT IS FURTHER ORDERED, That, in the event of grant of a construction permit to Partnership, such grant is conditioned upon the Commission's determination of the abuse-of-process issue specified in *National Communications Industries*, MM Docket 88-577.

25. IT IS FURTHER ORDERED, That in accordance with paragraph 9 hereinabove, Radio, Folden, Mahalocolo, Kasa Moku, Yang, Hazen, La Kio and Partnership shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

26. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

27. IT IS FURTHER ORDERED, That the following protective condition shall be appended to and become part of any construction permit issued as a result of this proceeding or subsequent station license granted to Radio, Folden, Mahalocolo, Kasa Moku, Lamaute, Yang, Hazen, Santee, La Kio, Partnership or Tropical:

"The authority granted herein is subject to the condition that the field intensity from the licensee's transmitter shall not exceed 27 mV/m as measured at the Federal Communications Commission's Waipahu office. In the event of interference to monitoring, direction finding, or related operations at the Federal Communications Commission's Waipahu office caused by either harmonic or spurious radiation, the licensee shall take such immediate corrective action as is necessary to eliminate the interference. This shall include responsibility for furnishing, installing, and adjusting transmitter filter circuits, shielding, or other corrective devices which may be necessary to mini-

mize harmonic or spurious radiation. If these measures fail to eliminate interference to FCC operations caused by the presence of the licensee's signal, or if the field intensity exceeds 27 mV/m, the licensee shall immediately reduce power to the extent necessary to eliminate the interference and to comply with the field limit. After determining this lower power level, the licensee shall immediately file an application with the Commission to establish this reduced power level as the authorized power on the station instrument of authorization."

28. IT IS FURTHER ORDERED, That the requests by Santee and La Kio for waiver of 47 C.F.R. § 73.316 ARE GRANTED.

29. IT IS FURTHER ORDERED, That the petition to deny filed by Folden against Yang IS DENIED.

30. IT IS FURTHER ORDERED, That Radio and Partnership shall submit amendments containing the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

31. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Radio, Folden Hazen, Santee, Partnership and Tropical ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

32. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

33. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

34. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] This matter may be pursued independent of the Commission's action developing a record "fully considering all aspects of [Sonrise's] activities *with respect to any and all applications that have been dismissed and that are no longer the subject of a pending or proposed hearing proceeding*" (emphasis added). *Inquiry into Alleged Abuses of the Commission's Processes*, 4 FCC Rcd 6342 (1989).

[2] Messrs. White (32.5%), Savage (32.5%) and McFall (5% interest) are shareholders of Sonrise Management Services, Inc., a 16.5% limited partner in Partnership.

[3] A joint petition for approval of settlement agreements to dismiss Radio Pacific's application with prejudice in return for $100,000 consideration was filed August 19. 1987, and subsequently approved October 9, 1987. *Scott Gerard Mahalick*, FCC 87M-2553, released October 13, 1987.

[4] *See e.g., J & C Broadcasting Company*, 3 FCC Rcd 5272 (1988).

[5] The *prima facie* determination is to be made without reference to contrary evidence and on the assumption that the specific facts set forth by the complaining party are true. *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 397 (D.C. Cir. 1985). In other words, the Commission must perform this threshold inquiry on the basis of the petitioner's allegations alone, limiting its field of consideration to the petition and its supporting affidavits. *Astroline Communications Company v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

[6] Since Section 73.3520 specifically prohibits same-community, same service applications, the broader-based (i.e., different communities) context of Section 73.3518 is less relevant in this matter. Section 73.3519 is wholly irrelevant since Yang's second application was filed *prior* to the FCC's action dismissing her application for Channel 286C with prejudice.

[7] Although not targeted by Folden's petition, Radio also filed (BPH-841114NA) to serve Honolulu on Channel 286C, was party to the settlement agreement cited in footnote 3, and referenced this fact in its tendered application for Channel 290C.

[8] Since Yang's binding commitment to dismiss her initial application dissolves the temporary multiple application relationship, this action constitutes an exception to rather than a waiver of the rules.

[9] On November 17, 1989, Folden filed its comments on Santee's October 11, 1989 amendment. While stating it had no objection to Santee's reporting "the transfer of the stock formerly held by the late Mr. Tindal," Folden argued that "it must be made clear that Santee may not accrue any comparative advantage from this transaction." As Santee correctly noted in its reply filed November 30, 1989, "[w]hether or not [it] claims integration credit for its principal and to what extent are factors to be considered once the pending applications are designated for hearing."

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-116

In re Applications of

GHIO BROADCASTING COMPANY, INC. (hereafter "Ghio")	File No. BPH-880426MA
HAMLET RADIO GROUP, INC. (hereafter "HRG")	File No. BPH-880428MA
HENRY LOVELY, JR. (hereafter "Lovely")	File No. BPH-880428MC
SHERRELL JACKSON (hereafter "Jackson")	File No. BPH-880428ML
WINGATE COLLEGE, INC. (hereafter "Wingate")	File No. BPH-880428MR
WALTER STURDIVANT, JR. (hereafter "Sturvidant")	File No. BPH-880428MT

For Construction Permit
for a New FM Station
on Channel 282A (104.3 MHZ)
in Hamlet, North Carolina

HEARING DESIGNATION ORDER

Adopted: February 28, 1990; Released: March 26, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Ghio*. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Ghio has not completed Item 4 correctly. The Ghio application gives a post office box number as the residence address for Giles Cloninger, III and David Ralay. Accordingly, Ghio must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

3. *Lovely*. In response to Section III, FCC Form 301, Lovely indicated that it was not financially qualified to construct and operate the requested facilities for three months without revenue, but added that he will amend his application shortly to certify his financial qualifications. Lovely "proposes to obtain the funds needed for construction and initial operation from a combination of personal assets and a bank commitment letter." On September 23, 1988, Lovely filed an untimely amendment certifying that he is now financially qualified. We note, however, that in the Commission's *Report and Order* in MM Docket No. 84-850, 50 Fed. Reg. 19,936 (May 13, 1985), the Commission adopted strict rules governing acceptance of amendments to FM applications. *See also* 47 C.F.R. § 73.3522(a)(6). That rule provides that predesignation amendments filed subsequent to the 30 day amendment period as of right will be considered only upon a showing of good cause. Lovely has failed to demonstrate good cause for its late-filed amendment. Therefore, its September 23, 1988 amendment, as it relates to the applicant's financial status, will be returned as untimely, and a financial qualifications issue will be specified below.

4. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANTS	AMENDMENTS FILED
Ghio	August 30, 1988
Lovely	July 27, 1988
Jackson	September 21, 1989
Sturdivant	August 15, 1988, March 31, 1989, January 19, 1990

5. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to Lovely, whether the applicant is financially qualified.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That Lovely's September 23, 1988 petition for leave to amend IS DENIED and the accompanying amendment IS HEREBY RETURNED. In addition, Lovely's July 27, 1988 petition for leave to amend, as well as those filed by Ghio, Jackson and Sturdivant, ARE GRANTED and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

9. IT IS FURTHER ORDERED, That Ghio shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

10. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-94

In re Applications:

R & B LTD. (hereafter R & B)	File No. BPH-880301MF
BIBLE BROADCASTING NETWORK, INC. (hereafter Bible)	File No. BPED-880301ML
WEISS BROADCASTING OF NOBLESVILLE, INC. (hereafter Weiss)	File No. BPH-880301MQ
BROADCAST COMMUNICATIONS, INC. (hereafter BCI)	File No. BPH-880301MZ
WMRI, INC. (hereafter WMRI)	File No. BPH-880301NV
SPACECOM, INC. (hereafter SpaceCom)	File No. BPH-880301NZ
COCHRAN - FORSTER PARTNERSHIP (hereafter Cochran-Forster)	File No. BPH-880301OW
BEN L. UMBERGER (hereafter Umberger)	File No. BPH-880301PD

For a Construction Permit
For a New FM Station in
Noblesville, Indiana
on Channel 230A

HEARING DESIGNATION ORDER

Adopted: February 22, 1990 **Released: March 26, 1990**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Bible.* In Item 1 of Section II of FCC Form 301, Bible indicates that it proposes to operate as a not-for-profit corporation. Bible, however, filed its application on FCC Form 301, the application for a construction permit for a commercial broadcast station. Noncommercial Educational FM applicants may apply for channels in the non-reserved band; they must, however, still comply with the legal requirements for an educational applicant found on FCC Form 340. Since the relevant engineering data may also be found on Form 301, a non-commercial educational applicant applying for a channel on the commercial band, and applying on a Form 301, must only submit the legal Sections II and III of Form 340. In order to qualify as an educational applicant, Bible must therefore, complete and submit as an amendment with the presiding Administrative Law Judge, Sections II and III of FCC Form 340.

3. Additionally, on the date Bible filed its application, it submitted a request for return of the filing fee as it is proposing a non-commercial facility. As noted above, Bible has not submitted the appropriate forms to the Commission in order for a determination to be made whether Bible has demonstrated an educational purpose in compliance with 47 C.F.R. § 73.503. Accordingly, Bible's fee has not been returned. The ruling with regard to the return of Bible's fee will be made post designation after Bible submits the requested Forms to the presiding Administrative Law Judge.

4. *BCI.* On November 13, 1989, BCI filed an amendment specifying a new transmitter site. This amendment was filed after the last date for filing amendments as a matter of right. BCI asserts that good cause exists for acceptance of this amendment. BCI states that its original site, owned by Browning Investments, Inc., is no longer available, as Browning has made other arrangements for development of that property. In support thereof, BCI submits a copy of an October 25, 1989 letter from Browning informing BCI that the proposed site is no longer available for BCI's use. After reviewing BCI's Petition for Leave to Amend and the supporting affidavits, we find that BCI has demonstrated good cause for the acceptance of its late file amendment. Furthermore, subsequent engineering studies have found the newly proposed site acceptable. Accordingly, BCI's application will be processed using its newly amended site.

5. *SpaceCom.* SpaceCom indicates that its voting shares are held solely by Space Center, Inc. The stock of Space Center, Inc is held in a voting trust with principals Donald McNeely and H. G. McNeely, Jr. as the beneficiaries, each holding 50% of the shares. SpaceCom states that the trustees who vote the shares are principals W. E. Barsness, M. W. McDonald, S. W. Richey and John M. Pierson. SpaceCom has failed to indicate what percentage of votes each trustee possesses and under what conditions they vote. Accordingly, SpaceCom will be required herein to state the voting precentages and to delineate the voting procedures of each of the trustees.

6. On November 29, 1988, SpaceCom amended its application to include J. M. Pierson as an officer of SpaceCom. However, SpaceCom failed to amend its application with all of the information required by Section II of FCC Form 301 for officers, directors and shareholders of corporate applicants. SpaceCom has not answered Item 2 of Section II indicating whether or not Mr. Pierson is a U.S. citizen. SpaceCom will herein be required to amend its application responding to Section II, Item 2 to indicate the nationality of Mr. Pierson.

7. *Cochran - Forster.* Section III of FCC Form 301 requires each applicant to answer whether they have sufficient net liquid assets on hand or available from committed sources to construct and operate the requested facility

for a period of three months without revenue. When Cochran-Forster filed its application, it answered "no" to Section III. Cochran-Forster, however, added a statement that certification will be supplied by an amendment. To date, the Commission has not yet received any such amendment. Accordingly, an issue will be specified as to Cochran-Forster's financial qualifications.

8. *Other Matters.* Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

9. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Bible	July 5, 1989
Weiss	September 13, 1989
BCI	January 3, 1989; June 2, 1988 (Engineering)
WMRI	August 9, 1988; September 2, 1988
SpaceCom	January 16, 1990; November 13, 1989; October 10, 1989; August 18, 1989; April 20, 1989; March 13, 1989; January 30, 1989; November 29, 1988; October 4, 1988; September 19, 1988; August 5, 1988; July 26, 1988
Umberger	December 27, 1989

10. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

11. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to Cochran-Forster, whether the applicant is financially qualified.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

12. IT IS FURTHER ORDERED, That Bible submit an amendment with completed Sections II and III of FCC Form 340 with the presiding Administrative Law Judge within 30 days of the release of this Order.

13. IT IS FURTHER ORDERED, That the late-filed amendment proposing a new site filed by BCI is accepted for filing.

14. IT IS FURTHER ORDERED, That SpaceCom submit an amendment with the presiding Administrative Law Judge detailing the voting rights of the trustee including the voting precentages each trustee holds and under what circumstances the votes are cast and/or overturned within 30 days of the release of this Order.

15. IT IS FURTHER ORDERED, That SpaceCom shall submit an amendment which contains the information required by Section II, Item 2 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

16. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Bible, Weiss, BCI, WMRI, SpaceCom and Umberger ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

17. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

18. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

19. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-540

In re Applications

MAJOR-KEENE PARTNERSHIP	File No. BPH-870615MH
CSJ INVESTMENTS, INC.	File No. BPH-870615MK
David H. Smith, Maureen L. Smith, James E. Spisiak, Patricia B. Spisiak d/b/a KEYS BROADCASTING SYSTEM	File No. BPH-870615MW
OCEAN FRONT RADIO LIMITED PARTNERSHIP	File No. BPH-870615MZ
CONCH COMMUNICATIONS CORP.	File No. BPH-870615NA
SOUTH STAR COMMUNICATIONS, INC.	File No. BPH-870615ND
KEY WEST BROADCASTING COMPANY	File No. BPH-870615NE

For Construction Permit for a
New FM Station on Channel 300C1
in Key West, Florida

MEMORANDUM OPINION AND ORDER

Adopted: March 13, 1990; Released: March 26, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. The Review Board has before it: (1) a *Memorandum Opinion and Order*, FCC 90M-184, released January 29, 1990, by Administrative Law Judge Joseph Chachkin (ALJ), which denied an extension request filed January 9, 1990 by Key West Broadcasting Co. ("Key West") for time to file its "Notice of Appearance" in this proceeding and to pay its required hearing fee, and dismissed Key West's application for failure to prosecute; (2) an Appeal filed February 5, 1990 by Key West challenging these rulings; and (3) the responsive pleadings thereto.

2. In order to participate in an FCC broadcast licensing hearing, an applicant is required to file with the Commission's Fee Section[1] (within 20 days of the Notice of Designation for Hearing) a "Notice of Appearance," accompanied by the $6 thousand hearing fee. 47 CFR § 1.221(c) and (f). Applicants seeking deferral of the hearing fee must submit their request concurrently with their "Notice of Appearance." 47 CFR § 1.221(g). The Commission's Managing Director (with the concurrence of its General Counsel) is authorized to act on deferral requests. 47 CFR § 0.231(c); *see also* 47 CFR § 1.1115(c).

3. In the case at bar, however, Key West did not file a "Notice of Appearance" or the fee (accompanied by a deferral request). Rather, it filed with the presiding ALJ a request for an extension of time to pay the fee, as well as to file its "Notice of Appearance." Lacking any authority to rule on fee deferrals, the ALJ had no discretion but to reject the requested relief; and in the absence of the hearing fee, he dismissed Key West's application for failure to prosecute. *See generally Word of Life Ministries, Inc.*, 4 FCC Rcd 5777, 5778 (1989) (presiding ALJ, not Fee Section, has delegated authority to dismiss applications in hearing status).[2] Key West's request for deferral of fees is similarly beyond the authority of the Board, *see Pueblo Radio Broadcasting Service*, 4 FCC Rcd 7510, 7511 n.2 (Rev. Bd. 1989), and we thus have no option but to reject the requested relief.[3] *See Reuters Ltd. v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986) (agency cannot depart from adherence to its own rules, even to achieve laudable aims).

4. ACCORDINGLY, IT IS ORDERED, That the Appeal filed February 5, 1990 by Key West Broadcasting Company IS DISMISSED; and

5. IT IS FURTHER ORDERED, That the Motion to Strike filed February 27, 1990 by Key West Broadcasting Company IS DENIED; and that Motion for Acceptance of Opposition Nunc Pro Tunc filed March 2, 1990 by CSJ Investments, Inc. IS GRANTED, but its Cross Motion to Strike filed in the same pleading IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] 47 CFR § 0.401(b)(1)(ii). *See also Establishment of a Fee Collection Program* (Supplemental Order), 2 FCC Rcd 1882 (1987).

[2] In a slightly different context, where the hearing fee had been paid and the "Notice of Appearance" filed (although not timely), we recently rehearsed:

> To allow an applicant to wait until after other applicants have filed their notices of appearance and paid their $6,000 hearing fee before deciding whether to participate in the proceeding is extremely prejudicial to the other applicants and amounts to a type of gamesmanship that

> cannot be tolerated. The rejection of this untimely filed notice of appearance is necessary in order to maintain the integrity of the Commission's Fee Program and to insure that an applicant's gamesmanship does not result in an unfair advantage.

Silver Springs Communications, 3 FCC Rcd 5049, 5049-5050 (Rev. Bd. 1988), *review denied*, 4 FCC Rcd 4917 (1989).

[3] This case is clearly distinguishable from *St. Croix Wireless Co.*, 3 FCC Rcd 4073 (1988), where the Commission reversed the Board (and ALJ) and reinstated an applicant (that failed to file its "Notice of Appearance"), solely for purposes of participating in a universal settlement agreement. The payment of a hearing fee was unnecessary there, because the parties had filed a settlement agreement by the deadline for filing Notices of Appearances. The Commission reported:

> Under these circumstances -- where the parties have entered into a universal settlement, the proceeding is being terminated, and there will be no prejudice to other parties or the public -- it is appropriate that leniency attach to the requirement for filing the notice of appearance, and settlement agreements can be approved contingent on the filing of the required notice.

.3 FCC Rcd at 4074.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-113

In re Applications of

GLOUCESTER-MATTHEWS COMMUNITY BROADCASTING, INC. (hereafter "Gloucester")	File No. BPH-880324MF
ROBINSON COMMUNICATIONS LIMITED PARTNERSHIP (hereafter "Robinson")	File No. BPH-880324MO
JOSEPH D. CAPOBIANCHI D/B/A J. C. BROADCASTING (hereafter "JC")	File No. BPH-880324NY

For Construction Permit
for a New FM Station on
Channel 256A (99.1 MHz)
in Gloucester, Virginia

HEARING DESIGNATION ORDER

Adopted: February 27, 1990; Released: March 27, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Robinson*. William Eure, the sole limited partner and 75 percent owner of the partnership interest in Robinson, is the Chairman of the Board and a 51 percent shareholder in Eure Communications, licensee of Station WKEZ-FM, Yorktown, Virginia. An engineering study reveals that Robinson's proposed facility in Gloucester is 100% encompassed within the WKEZ-FM 70 dBu contour. Although the proposal does not violate the Commission's multiple ownership rules, as Eure's equity interest in Robinson is nonattributable, it may violate the Commission's cross-interest policy. *See*, 47 C.F.R. §73.3555 Note 2(g). *See also*, *Reexamination of the Commission's Cross-Interest Policy*, 2 FCC Rcd 3699 (1987). (The cross-interest policy essentially prevents individuals or entities from having "meaningful" cross-interests in two broadcast stations serving substantially the same area.) Accordingly, an appropriate issue will be specified.

3. Robinson petitioned for leave to amend its application on August 9, 1988. JC petitioned for leave to amend his application on May 26, 1989. The accompanying amendments were filed after June 24, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

4. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine, with respect to Robinson, whether the involvement of William Eure with Station WKEZ-FM, Yorktown, Virginia, is consistent with the Commission's cross-interest policy and, if not, whether a grant of the application would be in the public interest.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Robinson and JC ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

8. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

9. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-112

In re Applications of

LOWNDES COUNTY BROADCASTING (hereafter "Lowndes")	File No. BPH-880226ML
ALBERT LEON BROOKS (hereafter "Brooks")	File No. BPH-880301MT
GREAT SCOTT BROADCASTING (hereafter "Scott")	File No. BPH-880301NQ
SKY BROADCASTING COMPANY (hereafter "Sky")	File No. BPH-880301NU

For Construction Permit
for a New FM Station on
Channel 299A (107.7 MHz)
in Valdosta, Georgia

HEARING DESIGNATION ORDER

Adopted: February 27, 1990; Released: March 27, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant below have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Scott would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

3. Scott petitioned for leave to amend its application on October 10, 1989. The accompanying amendments was filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

4. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Scott would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

8. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Scott IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

THE VISION GROUP File No. 2014-CT-P/L-88

For license authority to construct
and operate a station in the Local
Television Transmission Service

MEMORANDUM OPINION AND ORDER

Adopted: March 19, 1990; Released: March 27, 1990

By the Chief, Common Carrier Bureau:

1. Before the Bureau is the above-referenced blanket application of The Vision Group (formerly World Sports Enterprises, Inc.) for authority to construct and operate a station in the Local Television Transmission Service (LTTS) from various locations throughout the continental United States. The applicant, Vision Group, proposes to use frequencies in the 1990-2110 MHz (1.9 GHz), 2450-2483.5 MHz (2.4 GHz), 6425-6525 MHz (6.4 GHz) and 6875-7125 MHz (6.8 GHz) frequency bands. These bands are shared, co-equally and on a primary basis, among common carriers, private carriers, broadcast network entities, and cable system operators, pursuant to Parts 21, 94, 74 and 78 of the Commission's Rules, respectively. Vision Group intends to operate as a common carrier and provide mobile remote-pickup video services to its customers that may include television broadcast stations, television broadcast network entities, cable system operators, and cable network-entities. The Southern California Frequency Coordinating Committee (SCFCC), a non-profit California-based corporation that provides voluntary frequency coordination services free of charge primarily to Part 74 broadcast licensees, raised concerns specifically related to Vision's application, as well as concerns generally related to the Commission's allocation decision to expand the category of eligible users of frequencies that may be used for LTTS purposes. Vision Group filed a response.[1]

CONTENTIONS OF THE PARTIES

2. SCFCC alleges that permitting a "non-broadcast or network entity to operate in Part 74 spectrum will seriously and adversely impact day-to-day operations of broadcasters conducting business." It also maintains that "quasi-common carriers" such as Vision Group should be required to render their service offerings to broadcast customers in accordance with the Commission's rules and regulations applicable to Part 74 licensees to ensure adequate frequency coordination with local frequency coordination groups. In addition, it contends that the eligibility criteria for use of Part 74 frequencies require that applicants be either television broadcast or broadcast network entities. SCFCC also asserts that Channels A1 - A10 within the 1990-2110 MHz band in the Los Angeles area are already overburdened, and suggests that assignment of the channels for LTTS purposes will further congest an already heavily congested area. It further maintains that the "7 GHz" (6.8 GHz) band is, by convention, used for fixed studio to transmitter links in many markets, and thus these frequencies should not be made available for television remote pick-up services. SCFCC also maintains that Vision Group's application lacks sufficient technical information to assure Part 74 licensees that the applicant is "aware of the technical considerations of shared compatible operations". For example, it states that because Vision Group does not specify the antenna-type to be used by the proposed LTTS stations, other than that it will be FCC type-accepted equipment, it is difficult to ascertain whether the equipment will be acceptable to Part 74 licensees that have "banned by common agreement" the use of several types of FCC type-accepted equipment. SCFCC also takes the position that "real time" advance coordination with television Electronic News Gathering (ENG) control points is required by Section 21.100(d) of the Rules to accommodate television ENG operations and asserts that prior coordination with Part 74 users has not been sufficiently demonstrated by Vision Group in its application.

3. In response to these concerns, Vision Group argues that LTTS common carriers are expressly authorized by Section 21.801(b) of the rules to share frequencies with other communications service providers, including Part 74 licensees, to provide television remote pick-up services to television broadcast stations, television broadcast network entities, cable system operators and cable network-entities. It rejects SCFCC's assertion that common carriers that provide LTTS services to broadcasters are required by the Commission's rules to do so in accordance with the broadcaster's own license. Moreover, it argues that such a limitation would effectively deny broadcasters the flexibility to obtain service offerings from non-broadcast and network-entities. This flexibility, according to Vision Group, was an integral part of the Commission's decision to assign frequencies for television remote pick-up purposes on a shared use basis. Vision further states that SCFCC's claims regarding the adverse impact on broadcasters from Vision's proposal are unsupported. On the contrary, Vision describes its experience in providing television pick-up services to customers in heavily congested areas and its success in operating its stations in a manner that has not resulted in objectionable harmful interference to other band users.[2] Although Vision recognizes that the Commission imposes an obligation on an LTTS provider to coordinate its local operations with other users of shared frequencies, completion of the coordination process is not required at the time the authorization application is filed. Rather, Vision believes that Section 21.807(c) of the rules requires LTTS coordination with other users in shared frequency bands to occur prior to commencing service. At that time, the notification and response requirements of the frequency coordination process will enable the LTTS provider to resolve all technical matters relating to its operation in a non-interference manner with other users in the band, including the designation of specific FCC type-accepted equipment. According to Vision, an LTTS applicant is not required to certify at the time of filing that it will comply with specific frequency coordination procedures prescribed by frequency coordination groups such as SCFCC. These matters, it asserts, are intended to be resolved at the post-filing coordination stage.

DISCUSSION

4. The Local Television Transmission Service (LTTS) is a domestic public communications service that utilizes microwave facilities to establish transmission links for temporary or mobile television pick-up operations. The rules governing common carrier eligibility for this service are contained in Section 21.800 of the Commission's Rules, 47 C.F.R. § 21.800. Section 21.801 lists the frequencies that may be assigned for LTTS use. Section 21.801(b) expressly states that the frequencies proposed by Vision Group, which are listed in rule Sections 74.602(a), 78.18(a)(7) and 78.18(a)(8), are available for use by a common carrier to provide LTTS to television broadcast stations or network-entities and to cable operators or cable network-entities. Frequency availability is subject to the provisions of Section 74.604 and use of the facility is limited to the permissible uses described in Sections 74.631 and 78.11. Operations on these frequencies are also subject to the technical provisions of Parts 74 and 78. *See* 47 C.F.R. § 21.801(b).[3] The assignment of frequencies to mobile stations in LTTS is not limited to a single licensee within any area. However, Section 21.802 authorizes the Commission to impose geographical limits within which mobile units may operate. 47 C.F.R. § 21.802. LTTS providers are authorized to operate from temporary locations for a period not to exceed six months. Section 21.807 of the rules defines an LTTS station as a temporary fixed station that is to remain at a single location for less than six months. This rule section further provides that temporary services that are initially known to be of longer than six months' duration shall not be provided under a temporary fixed authorization, but shall be rendered pursuant to a "regular" license for microwave facilities. 47 C.F.R. § 21.807.

5. Implicit in the mobile nature of LTTS stations is their variance of location and time of operation. Consequently, their operation must be carefully coordinated with fixed stations and other mobile users within the same frequency bands to avoid harmful interference and to enable reliable use of the shared bands by all users. Vision Group acknowledges its duty to successfully complete the frequency coordination process prior to commencing operation. However, it disagrees with SCFCC that the coordination procedures applicable to LTTS providers require that coordination must be successfully completed prior to filing an LTTS application.

6. Section 21.807(c) of the rules provides that prior coordination of LTTS assignments will be in accordance with the frequency procedures described in § 21.100(d) except that the prior coordination process for LTTS assignments may be completed orally and the period allowed for response to a coordination notification may be less than 30 days if the parties agree. Section 21.100(d) provides, in pertinent part, that

> [p]roposed frequency usage shall be prior coordinated with existing users in the area and other applicants with previously filed applications . . . . Coordination shall be completed prior to filing an application for a *regular* authorization or an amendment to a pending application or a modification to a license when the proposed change is defined as major by the rules governing the service . . . .

47 C.F.R. § 21.100(d) (emphasis supplied). As previously described, Section 21.807 provides that LTTS authorizations are considered to be temporary fixed authorizations issued for periods not to exceed six months, as contrasted with authorizations issued under a "regular" license. This distinction between LTTS "temporary" (six months or less) authorizations and "regular" authorizations is important, because the Section 21.100(d) requirement regarding completion of frequency coordination prior to filing an application expressly applies only to "regular" authorizations. Consequently, Vision Group is correct in concluding that LTTS providers are not required to complete the frequency coordination process prior to filing an application.

7. Both Vision and SCFCC recognize the importance of the frequency coordination process, particularly where frequencies are shared among users. The success of the coordination process is, to a large extent, determined by the degree of cooperation between users of shared frequencies. Rule Section 21.100(d) sets forth detailed guidelines to facilitate the coordination process. Those guidelines incorporate a great deal of flexibility in terms of how the frequency coordination process is carried out. In particular, and in recognition of the short notice characteristics of temporary (mobile) services, the Commission modified the Section 21.100(d) notice and response procedures by providing for oral coordination on an expedited schedule to facilitate the needs of LTTS providers without jeopardizing the needs of other users of shared frequencies to operate in a non-interference manner. *Establishment of a Spectrum Utilization Policy for the Fixed and Mobile Services Use of Certain Bands Between 947 MHz and 40 GHz* (Third Report and Order) (Gen. Doc. No. 82-334), 2 FCC Rcd 1050 (1987), *recon.*, 2 FCC Rcd 6750 (1987). *See also supra*, para. 6. Additional Commission rules governing LTTS operations also serve to safeguard against undue interference among users of the shared spectrum. Even though blanket authorizations may be obtained for LTTS operations, Section 21.808 requires that LTTS station providers notify the Commission, either orally or in writing, prior to each period of operation. Furthermore, Section 21.808 describes the technical details of an LTTS station's operation that should be included in the notification to the Commission, including manufacturer's name, type or model number, output power and specific location of the transmitter(s), the location of the transmitting or receiving station with which it will communicate and the identity of the correspondent operating the facilities. Moreover, Section 21.801(b) expressly provides that Vision Group's proposed operations on frequencies in the 1990-2110 MHz, 2450-2483.5 MHz, and 6875-7125 MHz are subject to the technical provisions of Parts 74, and 78 of the Commission's Rules. To the extent those rule parts may specify compatible equipment type or permissible use of certain compatible channels, the LTTS licensee must comply with those requirements. These matters are appropriately raised at, and resolved at, the frequency coordination stage prior to operation. Vision Group has supplied the Commission with all the information it requires at the application stage.

8. As a final matter, we observe that the other arguments advanced by SCFCC relating to LTTS use of shared frequencies were echoed by broadcasters in Gen. Doc. No. 82-334. In that proceeding, broadcasters opposed the proposal to allow cable system operators and network-

entities to use the 1.9 GHz and 6.8 GHz bands for transmission of television signals on a coequal basis using mobile stations. In that proceeding, broadcasters were similarly concerned that cable operators would not exercise the same degree of care to coordinate their operations, and as a result would cause harmful interference to broadcast operations. They also expressed concern that increasing the number of users in shared bands would greatly increase the difficulty of coordination for television pick-up given the short notice nature of LTTS operation. The Commission rejected these arguments and found no evidence that cable operators would fail to act diligently in coordinating their operations with other users in shared bands.[4] Here, we are equally unpersuaded that SCFCC has shown sufficient support for its contention that LTTS operators will not diligently act to coordinate their operations with other users in shared bands. In fact, we believe it is in the mutual best interest of all users of shared bands to act diligently and in good faith to minimize harmful interference.[5]

CONCLUSION

9. SCFCC has provided no evidence that Vision's proposed service is not in the public interest or that its application should be conditioned or denied. Vision acknowledges that it must complete coordination with other users before it begins providing service in a particular area, and there is no basis in the record to find it will not do so.

10. Upon review of Vision Group's application and the pleadings filed related to that application, we find The Vision Group to be legally, technically, financially and otherwise qualified to render the proposed LTTS service and that grant of its application will serve the public interest, convenience, and necessity.

11. Accordingly, IT IS ORDERED that the application of The Vision Group IS GRANTED subject to notification to the Commission of successful completion of frequency coordination procedures.

12. IT IS FURTHER ORDERED That the informal objection filed by the Southern California Frequency Coordinating Committee IS DENIED and The Vision Group's Motion to Strike IS ALSO DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] In a subsequent letter dated July 1, 1988, SCFCC took issue with Vision Group's characterization of SCFCC's earlier filing as an informal objection, and described its earlier letter as a mere "inquiry" that did not request the denial of World Sports' application. On July 7, 1988, Vision Group filed a Motion to Strike SCFCC's July 1 letter as an unauthorized pleading. Whether SCFCC's letter is characterized as an informal objection or a "mere inquiry" does not have a significant bearing on our consideration of the issues raised by SCFCC or our consideration of Vision Group's response to those issues. Consequently, we need not reach the issue of whether the July 1 letter constitutes an unauthorized pleading.

[2] Pending consideration of Vision Group's LTTS application, it filed several requests for Special Temporary Authority (STA) to construct and operate LTTS stations at various locations in the continental U.S. These applications were unopposed. Temporary authority was granted to Vision Group, pursuant to the guidelines contained in Section 21.25 of the Rules, 47 C.F.R. § 21.25, and upon the condition that, *inter alia*, frequency coordination requirements of Section 21.100(d) applicable to LTTS providers would be satisfied, and notification to the Commission prior to operation would be made in accordance with the requirements of Section 21.808. Temporary authority in each instance was granted subject to final action taken with respect to Vision Group's pending application.

[3] The frequency bands assigned to LTTS may be used only for *mobile* transmission of television signals. Use of these bands for direct delivery of television programs to the general public or for multi-channel cable distribution is not permitted. *See* 47 C.F.R. § 21.801.

[4] *Third Report and Order*, 2 FCC Rcd at 1051-1052.

[5] SCFCC also raised a question regarding the accuracy of Vision Group's response to Question 21 of FCC Form 494, "Application for a New or Modified Microwave Radio Station License Under Part 21". Item 21 asks whether a Section 214 authorization application has been made, and if so, to identify the date filed or estimated date of filing. Vision Group answered "n/a" in response to this question. The Commission has held that no separate Section 214 authorization is necessary for the relay of television signals (including both video and associated audio) over terrestrial radio facilities already authorized under Title III of the Act. *See* Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor (First Report and Order), 85 F.C.C. 2d 1, 45, 46 (1980).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HERITAGE
CABLEVISION
ASSOCIATES
OF DALLAS, L.P.,
and TEXAS CABLE TV
ASSOCIATION, INC.,
Complainants,

v. File No. PA-89-002

TEXAS UTILITIES
ELECTRIC COMPANY,
Respondent.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Deputy Chief, Enforcement Division
Common Carrier Bureau

ORDER

Adopted: March 20, 1990; Released: March 27, 1990

By the Deputy Chief, Enforcement Division:

1. On March 16, 1990, counsel for Texas Utilities Electric Company (Texas Utilities) filed a Motion to Extend Procedural Schedule and Request for Expedited Consideration in the referenced proceeding. The motion pertained to a schedule established by the Enforcement Division for the briefing of issues of statutory interpretation relating to Section 224 of the Communications Act of 1934, as amended, 47 U.S.C. § 224, (the Act).

2. In its accompanying papers, counsel for Texas Utilities argued that it has not received sufficient discovery at this juncture to permit it to properly argue its legal position and stated that no party would be burdened by the grant of its motion.

3. Since the initial filing date for briefs in this matter is March 26, 1990, the Enforcement Division requested a conference call with the parties on March 19, 1990, to discuss the issues raised. The facts that emerged in the conference call showed that significant discovery had indeed taken place and that the record is sufficiently developed to permit comprehensive briefing of the issue of legislative interpretation. It was further established that some difficulty has occurred in obtaining cable hookups and therefore it was possible that plaintiff's case would be prejudiced by grant of the motion. Therefore, the motion for additional discovery prior to such briefing is denied.

4. However, it became clear in the discussion that additional time may be required to adequately treat the issues to be decided at this juncture. Therefore, the filing dates for briefs and replies are extended to April 9, 1990, and April 23, 1990, respectively.

5. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the motion is GRANTED in part and DENIED in part, to the extent indicated above.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-163

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Bay St. Louis and Poplarville, Mississippi) — RM-7170

NOTICE OF PROPOSED RULE MAKING

Adopted: March 12, 1990; Released: March 27, 1990

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Dowdy and Dowdy Partnership (petitioner), licensee of Station WZKX(FM), Channel 300C, Poplarville, Mississippi. Petitioner requests an amendment of the FM Table of Allotments to change the community of license for Channel 300C from Poplarville to Bay St. Louis, Mississippi, and modification of its license accordingly. Petitioner provided information in support of its proposal.

2. Petitioner states that the change of community would provide Bay St. Louis and surrounding Hancock County with a first full time local transmission service. Petitioner notes that the 1980 U.S. Census lists Bay St. Louis with a population of 7,891. Petitioner argues that Bay St. Louis is the seat of Hancock County, a county with a population of 24,537. Petitioner notes that Bay St. Louis is presently served by daytime only station WXGR(AM). According to petitioner, Poplarville, Mississippi, has a population of 2,562, and currently is served by day time only Station WRPM(AM). Petitioner informs us that it does not propose to modify Station WZKX(FM)'s transmission facilities.

3. We believe the proposal warrants consideration. The proposal will not deprive Poplarville of its only local broadcast service and Bay St. Louis could receive its second local service. The proposal is mutually exclusive with the present facilities at Poplarville because the community separation is less than the required 290 kilometers for Class C co-channel allotments.

4. Channel 300C can be reallotted from Poplarville to Bay St. Louis in compliance with the Commission's minimum distance separation requirements at the site specified by petitioner.[1] As requested, we shall propose to modify the license of Station WZKX(FM) to change the community of license and specify operation on Channel 300C at Bay St. Louis. In accordance with Section 1.420(i) of the Commission's Rules, we shall not accept competing expressions of interest in the use of Channel 300C at Bay St. Louis nor require the petitioner to demonstrate the availability of an additional equivalent class channel at Bay St. Louis.

5. In view of the fact that Bay St. Louis, Mississippi, could receive its first full time FM channel, the Commission believe it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b), of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Poplarville, Mississippi	300C	—
Bay St. Louis, Mississippi	—	300C

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **May 18, 1990,** and reply comments on or before **June 4, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lawrence J. Bernard, Jr.
Ward & Mendelsohn, P.C.
1100 17th Street, N.W., Suite 900
Washington, D.C. 20036
(Counsel for the petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been

served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 300C at Bay St. Louis are 30-44-48 and 89-03-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-559

In the Matter of

Amendment of Section 73.202(b), RM-6351
Table of Allotments,
FM Broadcast Stations.
(Aberdeen, Washington)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 12, 1990; Released: March 27, 1990

By the Chief, Allocations Branch:

1. Pursuant to the request of KAYO Broadcasting (petitioner), licensee of Station KAYO(FM), Channel 257A at Aberdeen, Washington, the Commission considers herein the *Notice of Proposed Rule Making*, 4 FCC Rcd 8480 (1989), proposing the substitution of Channel 257C1 for Channel 257A at Aberdeen, and the modification of Station KAYO(FM)'s license accordingly. Petitioner filed supporting comments restating its intention to apply for the higher powered channel.

2. We believe the public interest would be served by the allotment of Channel 257C1 at Aberdeen, Washington, providing that community and its surrounding areas with expanded FM coverage service. Channel 257C1 can be utilized at the present transmitter site of Station KAYO(FM) consistent with the Commission's minimum distance separation requirements to all domestic allotments.[1] Since Aberdeen is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence has been obtained from the Canadian government for the allotment. In addition, because the allotment creates short spacings to Canadian Station CFOX-FM, Channel 257C, Vancouver, British Columbia, and vacant Channel 258A at Sooke, British Columbia, we have also obtained approval for Channel 257C1 at Aberdeen to operate as a specially negotiated short-spaced allotment.[2]

3. As requested, we are herein modifying the license of Station KAYO(FM) to specify operation on Channel 257C1 in accordance with Section 1.420(g) of the Commission's Rules.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 11, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Aberdeen, Washington	257C1, 284C1

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of KAYO Broadcasting for Station KAYO(FM), IS MODIFIED, to specify operation on Channel 257C1 in lieu of Channel 257A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The coordinates are 46-56-59 and 123-49-13.

[2] The station's operation is limited to 100 kW and HAAT of 80 meters towards Station CFOX-FM at Vancouver.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-342

In the Matter of

Amendment of Section 73.202(b), RM-6740
Table of Allotments,
FM Broadcast Stations.
(Monahans, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 12, 1990; Released: March 27, 1990

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 4 FCC Rcd 6181 (1989), issued at the request of Rusk Corporation (petitioner), the licensee of Station KWES(FM), Channel 271C1 at Monahans, Texas, proposing the substitution of Channel 271C for Channel 271C1 at Monahans and the modification of the license of Station KWES(FM) at Monahans accordingly. Petitioner filed supporting comments restating its intention to apply for the channel.

2. We believe the public interest would be served by substituting Channel 271C for Channel 271C1 at Monahans, Texas, providing that community with expanded FM service. Channel 271C can be allotted to Monahans consistent with the Commission's minimum distance separation requirements at the petitioner's specified site.[1] Since Monahans is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence by the Mexican government has been obtained for the allotment.

3. As requested, we are modifying the license of Station KWES(FM) to specify operation on Channel 271C in accordance with Section 1.420(g) of the Commission's Rules.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 11, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Monahans, Texas	260C1, 271C

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Rusk Corporation for Station KWES(FM), Monahans, Texas, IS MODIFIED, to specify operation on Channel 271C in lieu of Channel 271C1, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates are 31-57-55 and 102-46-10. Because this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, the permittee may avail itself of the provisions of Section 73.213(c)(1) of the Commission's rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-343

In the Matter of

Amendment of Section 73.202(b), RM-6761
Table of Allotments,
FM Broadcast Stations.
(Dresden, Tennessee)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 12, 1990; Released: March 27, 1990

By the Chief, Allocations Branch:

1. Pursuant to the request of Valley View Broadcasting, Inc. (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 6186 (1989), proposing the allotment of Channel 236A to Dresden, Tennessee, as that community's first local FM service. Petitioner filed supporting comments reiterating its interest in the allotment.

2. We believe the public interest would be served by allotting Channel 236A to Dresden, as that community's first local FM service. The channel can be allotted in compliance with the Commission's minimum distance separation requirements with a site restriction of 3.4 kilometers (2.1 miles) south of the city.[1] The restriction is required in order to avoid a short spacing to Station WXID(FM), Channel 234C2 at Mayfield, Kentucky.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 11, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Dresden, Tennessee	236A

4. The window period for filing applications will open on **May 14, 1990,** and close on **June 13, 1990.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, .(202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates are 36-15-39 and 88-42-29. Because this allotment is made as a result of a petition for Rule Making filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Appointment
of the Defense Commissioner

ORDER

Adopted: January 2, 1990; Released: January 12, 1990

By the Commission:

1. Pursuant to Section 0.181 of the FCC Rules, we hereby appoint Commissioner Andrew C. Barrett to be Defense Commissioner. The Defense Commissioner is responsible for overseeing all National Security Emergency Preparedness functions for the Commission. This involves serving as primary Commission defense spokesperson, approving industry emergency plans including those for the Emergency Broadcast System, representing the Commission in interagency matters pertaining to continuity of government during national emergencies, and assuming the duties of the Commission under some emergencies.

2. ACCORDINGLY, IT IS ORDERED, pursuant to Section 0.181 of the FCC rules, that Andrew C. Barrett shall serve as Defense Commissioner.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-114

In re Applications of

MEGA MEDIA, LTD. File No. BPH-880415MD
(hereafter "Mega")

E. W. BIE File No. BPH-880415MF
(hereafter "Bie")

For Construction Permit for a
New FM Station on Channel 258A in
Eldora, Iowa

HEARING DESIGNATION ORDER

Adopted: February 27, 1990; Released: March 28, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Mega petitioned for leave to amend its application on February 23, 1989, August 1, 1989 and November 15, 1989. The accompanying amendments were filed after May 27, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

3. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Bie has filed such statement, it is deficient. Bie has not listed a women's organization. Accordingly, Bie will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

4. Data submitted by the applicants indicate there would be significant difference in the size of the populations which would receive service from the proposals. Consequently, the populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Mega ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

8. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Bie shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-135

In re Applications of

CARDWELL BROADCASTING (hereafter: Cardwell) — File No. BPH-880301NT

Karl Nurse d/b/a NURSE COMMUNICATIONS (hereafter: Nurse) — File No. BPH-880301NX

HAPPY VALLEY BROADCASTING, INC. (hereafter: Happy) — File No. BPH-880301OR

For Construction Permit for a New FM Station on Channel 230A, Turners Falls, Massachusetts

HEARING DESIGNATION ORDER

Adopted: March 2, 1990; Released: March 28, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Cardwell.* Cardwell proposes to locate on the existing tower of land mobile radio call sign KCC-535. Cardwell lists the geographic coordinates of the site in FCC Form 301 (October 1986), Section V-B, Item 2(b) as 42°32' *04* " NL, 72°35' 33" WL. However, it plotted the coordinates in Exhibit 4 (transmitter site map) at 42°32' *02* " NL, 72°35' 33" WL. In its April 6, 1988 amendment, Cardwell notes that the coordinates it used in its application are those actually on the current licensee's authorization, while the coordinates of the tower as printed on the official USGS map are the ones it lists in Exhibit 4. Since Cardwell proposes to locate on an existing tower, the coordinate discrepancy does not affect the acceptability of Cardwell's application. However, within 30 days of the release of this Order, Cardwell will be required to verify which set of coordinates is correct and to submit an amendment to the presiding Administrative Law Judge resolving the coordinate discrepancy.

3. *Happy.* Happy did not provide an answer to Item 3(b), Section II, FCC Form 301 (October 1986). Accordingly, Happy will be required to submit an amendment to the presiding Administrative Law Judge answering this question within 30 days of release of this Order.

4. *Environmental Impact.* Item 20, Section V-B, FCC Form 301 (October 1986), asks whether grant of the application comes within Section 1.1307 of the Rules such that it may have a significant environmental impact. Cardwell correctly answered in the negative, since at the time of filing it was categorically excluded from environmental processing because it proposes to locate its antenna on an existing tower and its radio frequency radiation is not in excess of the guidelines cited in Section 1.1307(b).[2] Nurse answered Item 20, Section V-B in the negative and further states on page 3 of its engineering statement that its proposal "does not involve construction of a new structure corresponding to any of the types of facilities specified in Section 1.1307(a)." However, Nurse should have answered affirmatively because it proposes to construct a new tower near a registered historic landmark. Happy, which plans to build a new tower, answered Item 20, Section V-B in the affirmative and submitted an environmental assessment (EA). However, in its EA, Happy incorrectly states that its proposed site was not located at or near a registered historical landmark or monument.

5. A number of informal objections have been filed against the proposals. The Massachusetts Historical Commission and the Advisory Council on Historic Preservation filed informal objections, dated March 29, 1989 and May 11, 1989, respectively, to all applications filed for the Turners Falls allocation. Eaglebrook School filed informal objections, dated March 21, 1989 and April 5, 1989, specifically against Happy's application. Historic Deerfield, Inc. also filed informal objections against Happy's application dated April 3, 1989 and May 5, 1989. The informal objections center on the claim that the applicants' tower proposals may affect the "Old Deerfield Village," which was designated a Registered National Historic Landmark in 1960, and whose boundaries were defined in 1976 and identified and registered in the National Register for Historic Places in 1978. The objections against Happy also charge that Happy's statement that its proposed site is not located at or near a registered historical landmark or monument was an intentional fabrication and a deliberate attempt to mislead the Commission. Happy filed an opposition to Eaglebrook School's objection on April 5, 1989 and an opposition to Historic Deerfield's objection on April 17, 1989. In its opposition to Eaglebrook School, Happy argues that there are already three radio towers on Pocumtuck Rock; that its site is 1,200 feet south of the southernmost of the three and is two-tenths of a mile further from the geographic center of Deerfield; and that its tower would only be 34 feet higher than the next tallest (and most recently constructed) tower. In its opposition to Historic Deerfield, Happy incorporates by reference its opposition to Eaglebrook School and additionally argues that, at its nearest boundary, the Deerfield Historic Site is more than six-tenths of a mile from Happy's proposed transmitter; that all of the historic buildings within the Site are located in the village, and the meadowlands within the southern portion of the site most proximate to the proposed tower are not incorporated into the activities of Historic Deerfield; and that the area to the east of the Deerfield Historic Site, including Pocumtuck Ridge, includes both residential and commercial development.

6. Pursuant to Section 1.1307, facilities that may affect properties listed or eligible for listing in the National Register of Historic Places require submission of an EA prepared in accordance with Section 1.1311. As noted earlier, while Cardwell's proposal was categorically excluded from environmental processing at the time of filing, and thus did not require the filing of an EA,

pursuant to the rule change effective September 26, 1988, its proposal is now subject to environmental processing. Accordingly, Cardwell [3] will be required to submit an EA in accordance with Section 1.1311 to the presiding Administrative Law Judge within 30 days of release of this Order. Misrepresentation issues will be specified below against Happy and Nurse to determine whether they made misrepresentations to, were lacking in candor in their dealings with, or attempted to deceive or mislead the Commission when they stated that their proposed transmitter sites were not located at or near a registered historic landmark. Nurse also will be required to submit an EA to the presiding Administrative Law Judge.

7. *Late - filed Amendments*. Cardwell has petitioned for leave to amend its application on February 3, 1989 and February 27, 1989. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

8. *Areas and Populations*. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Cardwell, Nurse and/or Happy in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine, in light of the evidence adduced pursuant to the matters discussed in paragraphs 4-6, above, whether Happy and Nurse made mispresentations to the Commission, were lacking in candor in their dealings with the Commission or attempted to deceive or mislead the Commission.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That within 30 days of release of this Order, Caldwell shall submit an amendment resolving its coordinate discrepancy to the presiding Administrative Law Judge.

12. IT IS FURTHER ORDERED, That in accordance with paragraph 3 hereinabove, Happy shall submit an amendment providing an answer to Item 3(b), Section II, FCC Form 301 (October 1986) to the presiding Administrative Law Judge within 30 days of release of this Order.

13. IT IS FURTHER ORDERED, That in accordance with paragraph 6 hereinabove, Cardwell and Nurse shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

14. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Cardwell ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

15. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

16. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] The application of Reid Broadcasting (ARN-880301OZ) was dismissed on April 11, 1988 for failure to pay the filing fee pursuant to 47 C.F.R. § 1.1110(a)(1).

[2] Effective September 26, 1988, however, antennas built on existing structures that are, or may affect, historic properties are not categorically excluded from environmental processing.

[3] Although Cardwell presents its assessment that its proposal would have no adverse impact on Old Deerfield Village in its February 3, 1989 amendment and February 27, 1989 erratum thereto, this does not comprise a complete environmental assessment pursuant to Section 1.1311.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-155

In re Applications of

BALDRIDGE SHELTON PARTNERSHIP (hereafter: Baldridge) — File No. BPH-880419MB

ANDREW PERRY ADSIT (hereafter: Adsit) — File No. BPH-880421MY

WEBSTER BROADCASTING, INC. (hereafter: Webster) — File No. BPH-880421NE

KANKAKEE BROADCASTING LIMITED PARTNERSHIP (hereafter: KBLP) — File No. BPH-880421NT

For Construction Permit for a New FM Station on Channel 236A, Kankakee, Illinois

HEARING DESIGNATION ORDER

Adopted: March 8, 1990; Released: March 28, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matter.* On April 4, 1989, KBLP filed a petition to deny the application of Webster. The petition to deny is essentially a petition to specify issues. Since the Commission's *Report and Order* in re *Revised Procedures for the Processing of Contested Broadcasting Applications; Amendments of Part I of the Commission's Rules*, 72 FCC 2d 202, 45 RR 2d 1220 (1979), directed the deletion of all issue pleadings in pending cases, the matters sought to be raised in these petitions have not been considered. Accordingly, the petition will be dismissed herein and an opportunity to raise any allegations contained therein will be afforded the parties post-designation pursuant to 47 C.F.R. § 1.229.

3. *Financial.* Section III of FCC Form 301 asks each applicant to certify whether or not it has sufficient net liquid assets on hand or available from committed sources to construct and operate the requested facility for three months without revenue. When Webster filed his application on April 21, 1988, he answered "yes" to that question, adding the statement: "The applicant has not, however, completed preparation of all documentation supporting its financial qualifications. The applicant will do so shortly and will report that this has been completed in an appropriate amendment." However, no such amendment was ever filed. Accordingly, a financial issue will be specified.

4. *Areas and Populations.* Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. *Air Hazard.* Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and applicant Adsit have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna supporting structure proposed by Adsit would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Webster is financially qualified to be a Commission licensee.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by Adsit would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That the Petition to Deny filed by KBLP on April 4, 1989 IS HEREBY DISMISSED.

9. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

10. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance

stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 21, 1990

COMMENTS INVITED ON INDIANA REGIONAL PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for the Indiana area (Region 14).

In accordance with the Commission's Report and Order in General Docket 87-112 implementing the Public Safety National Plan, parties are hereby given thirty days from the date of Federal Register publication of this public notice to file comments and fifteen days to reply to any comments filed. (*See* Report and Order, General Docket 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

In accordance with the Commission's Memorandum Opinion and Order in General Docket 87-112, Region 14 consists of the State of Indiana, except for the following counties: Lake, La Porte, Jasper, Starke, St. Joseph, Porter, Newton, Pulaski, Marshall and Elkart counties. General Docket 87-112, 3 FCC Rcd 2113 (1988).

Comments should be clearly identified as submissions to *General Docket 90 - 178, Indiana - Region 14,* and commenters should send an original and five copies to the Secretary, Federal Communications Commission, Washington, DC 20554.

Questions regarding this public notice may be directed to Maureen Cesaitis, Private Radio Bureau, (202) 632-6497, or Fred Thomas, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Tariff F.C.C. No. 9 — Transmittal No. 1990

Accunet T1.5, T45, Dataphone Digital Service, and Multi-Service Volume Pricing Plan

ORDER

Adopted: March 19, 1990; Released: March 20, 1990

By the Chief, Common Carrier Bureau:

1. On December 21, 1989, AT&T Communications (AT&T) filed the above-captioned transmittal to (i) revise month-to-month rates for Accunet T1.5 Service Inter-Office Channels (IOCs), (ii) modify the fixed rate plans for T1.5, (iii) revise the Multi-Service Volume Pricing Plan (MSVPP), (iv) revise rates applicable to three office functions, and (v) introduce a new service -- Bandwidth Management Service-Extended (BMS-E). AT&T Description and Justification (D&J) at 1. Communications Transmission, Inc. (CTI) filed a petition to reject or, in the alternative, to suspend and investigate on January 5, 1990. AT&T filed a reply on January 16, 1990. Transmittal 1990 is scheduled to become effective on March 21, 1990, on 90 days' notice.

2. In its petition, CTI asserts that Transmittal 1990 is unreasonably discriminatory in violation of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a). CTI Petition at 2. CTI argues that Transmittal 1990 proposes further rate reductions to services for which AT&T recently lowered rates in Transmittal 1690.[1] By doing so, CTI continues, AT&T is predatorily pricing its bulk spectrum services so as to gain an unfair advantage in that particular market. *Id.* at 2-3. In addition, CTI alleges that AT&T is using common plant to offer similar services at different rates under the business and small business baskets established by the Commission's price cap rules.[2] *Id.* at 4-6. Finally, CTI avers that AT&T has failed to properly support Transmittal 1990 under Section 61.49 of the Commission's Rules, 47 C.F.R. § 61.49. *Id.* at 6-8.

3. AT&T denies that Transmittal 1990 reduces rates for services previously reduced in Transmittal 1690. AT&T Reply at 2. Furthermore, AT&T contests CTI's argument that AT&T has failed to support Transmittal 1990 under Section 61.49 of the Commission's Rules. *Id.* at 2-4. Transmittal 1990, AT&T continues, has been supported by the appropriate net revenue showings required. *Id.* AT&T also denies CTI's assertion that Transmittal 1990 is unreasonably discriminatory or that it constitutes predatory pricing. *Id.* at 4-6.

4. The Common Carrier Bureau has reviewed the tariff transmittal, and the various pleadings. We conclude that no compelling argument has been presented that the tariff transmittal is patently unlawful so as to require rejection and that no question has been presented that warrants investigation at this time.

5. Accordingly, IT IS ORDERED that the petition to reject or, in the alternative, to suspend and investigate filed by Communications Transmission, Inc. against AT&T Communications, Tariff F.C.C. No. 9, Transmittal 1990 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* AT&T Communications, Tariff F.C.C. No. 9, Transmittal 1690, 4 FCC Rcd 6833 (Com.Car.Bur. 1989).

[2] *See* 47 C.F.R. § 61.41; *see also* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Report and Order, Second Further Notice of Proposed Rule Making, 4 FCC Rcd 2873, 3037-67 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION — File No. I-T-C-90-051

Application for authority to lease and operate facilities for direct service between the U.S. and Aruba.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 20, 1990; Released: March 28, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on January 30, 1990 by MCI Telecommunications Corp. (MCI), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite and connecting facilities for direct service between the U.S. and Aruba. The application was placed on public notice on February 7, 1990. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Aruba by MCI.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-051 IS GRANTED, and MCI is authorized to:

a. lease from Comsat and operate 30 voice-grade satellite half-circuits between the Andover, Maine earth station and an appropriate satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Aruba, furnished by MCI's correspondent in Aruba;

b. own and operate 30 voice-grade circuits in the Andover, Maine earth station;

c. own and operate 30 voice-grade connecting circuits between the Andover, Maine earth station and MCI's West Orange, New Jersey office; and

d. use said facilities to provide MCI's regularly authorized services, including switched voice, between the U.S. and Aruba and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between MCI and its correspondent in Aruba, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TMC LONG DISTANCE of WASHINGTON, DC — File No. I-T-C-90-041

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 20, 1990; Released: March 28, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on December 14, 1989 by TMC Long Distance of Washington, DC (TMC), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on January 17, 1990. No comments were received.

2. The applicant is a non-dominant domestic resale common carrier. It now proposes to resell international switched voice services in competition with other common carriers already providing resale of such services. In authorizations of new entrants over the past decade, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by TMC.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-90-041, IS GRANTED, and TMC is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1, and US Sprint's Tariff F.C.C. No. 1, between the United States and the points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of its execution.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See, e.g.*, the cases cited in the Teltec Saving Communications Co., File No. I-T-C-86-062, Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI INTERNATIONAL, INC. File No. I-T-C-90-042

Application for authorization under Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in the PTAT-1 Cable System for the provision of authorized common carrier service between the United States, on the one hand, and the United Kingdom and Ireland, on the other hand.

ORDER AND AUTHORIZATION

Adopted: March 20, 1990; Released: March 28, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on December 21, 1989 by MCI International, Inc. (MCII), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in the Private Transatlantic Telecommunications Cable System (PTAT-1) for the provision of authorized common carrier services between the U.S., on the one hand, and the United Kingdom and Ireland, on the other hand, and beyond. The application was placed on public notice on January 17, 1990. No comments were received.

2. MCII is a non-dominant international carrier currently providing international services to the points reached via the PTAT-1 cable system. MCII has been authorized to acquire and operate a one-half interest in 13 E-1 circuits[1] in the PTAT-1 cable system for service between the U.S. and the United Kingdom, the Republic of Ireland, Bermuda and points beyond.[2] It now proposes to acquire and operate an additional one-half interest in eight E-1 circuits and two DS-3 circuits [3] in PTAT-1. MCII states that it will be using the capacity in PTAT-1 to supplement existing facilities and not to divert any portion of its traffic from other existing common carrier facilities.

3. The Commission stated in its *Private Submarine Cable Decision* [4] that it would require common carriers wishing to acquire capacity in PTAT-1 to file applications pursuant to Section 214 of the Communications Act.[5] In this context, we find that MCII's application contains all of the information necessary under Section 63.01 of the Commission's Rules.[6] Furthermore, we find that MCII's application does not raise any economic impact issues.[7]

4. Upon consideration of the application, we find that authorization of the facilities requested would serve the public convenience and necessity.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-90-042 IS GRANTED, and MCII is authorized to:

a. acquire on an IRU and/or lease basis, as appropriate, a one-half interest in eight E-1 circuits and two DS-3 circuits in the PTAT-1 cable;

b. lease and operate necessary domestic connecting facilities; and

c. utilize said facilities to provide MCII's regularly authorized services between the U.S., on the one hand, and (1) the United Kingdom (two DS-3 and six E-1 circuits); and (2) the Republic of Ireland (two E-1 circuits) on the other hand, and beyond.

6. IT IS FURTHER ORDERED that this authorization is subject to the terms and conditions of any license issued to PSI herein under the act entitled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§34-39).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] An E-1 circuit is equivalent to a capacity of 2.048 megabits per second (Mbps).

[2] *See* CICI, Inc. *et al* 4 FCC Rcd 6622 (1989) and MCI International, Inc. 4 FCC Rcd 8446 (1989) and 5 FCC Rcd 453 (1990).

[3] A DS-3 circuit is equivalent to a capacity of 45 Mbps.

[4] Private Submarine Cable Decision, 100 FCC 2d 1033 (1985).

[5] This requirement was restated in the *International Competitive Carrier* decision, in which the Commission determined that it would require non-dominant carriers to file applications to acquire capacity from any future private cable sources. International Competitive Carrier Policies, 102 FCC 2d 812, 845 (1985). Information requirements for Section 214 applications are found in Section 63.01 of the Commission's Rules 47 C.F.R. §63.01.

[6] The Commission places no special burdens on any carrier filing an application to use private cable capacity. *See* Pacific Telecom, Inc., Request for Clarification of Policies Concerning Use of Independent Cables, File No. ISP-89-002, 4 FCC Rcd 4454 (1989)(*Pacific Telecom decision).*

[7] In its *Pacific Telecom decision*, the Commission stated that it has authority under its public interest mandate under Section 214 to consider *sua sponte* any economic impact issues, including traffic diversion issues, that may be raised in an application by a common carrier to acquire private cable capacity or to consider such issues when raised by third parties filing comments in response to an application. However, the Commission

has stated that it does not anticipate that common carrier acquisition of private cable capacity will normally give rise to such issues. Even if an applicant seeks to acquire a substantial amount of private cable capacity and to offload capacity on a common carrier cable or change a prior commitment for use of capacity in planned common carrier facilities, the Commission stated that the presence of these factors would not be conclusive evidence of economic harm. The Commission further stated that the "[r]esolution of any economic impact issues that may arise, and a determination of whether grant of the application would serve the public interest, would be dictated by the circumstances of the particular case before us." *Id.* at 4456.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-494

In the Matter of

Enforcement of Prohibitions
Against Broadcast Indecency in
18 U.S.C. § 1464

ORDER EXTENDING TIME TO FILE REPLY COMMENTS

Adopted: March 19, 1990; Released: March 19, 1990

By the Chief, Mass Media Bureau:

1. On October 26, 1989, the Commission adopted a *Notice of Inquiry*, 4 FCC Rcd 8358 (1989), in response to a remand of the record in *Action for Children's Television v. FCC*, No. 88-1916 (D.C. Cir. Sept. 13, 1989) (*ACT II*) to solicit public comment regarding the validity of a total ban on the broadcast of indecent material. The Commission established a deadline of January 19, 1990 for filing comments, and a deadline of February 16, 1990 for filing reply comments. These deadlines were extended to February 20, 1990 for comments and March 20, 1990 for reply comments pursuant to a request filed jointly by Capital Cities/ABC and other parties.[1]

2. Before the Commission are two motions for extension of time to file reply comments, one filed by the American Family Association, Inc. (AFA) and others[2] seeking a 20-day extension, and one filed by Salem Communications Corp. (Salem), supported by Focus on the Family and Family Research Council, seeking a 30-day extension. Both parties state that they require additional time to fully review and respond to the comments filed. AFA notes that they participated in another rule making proceeding before the Commission related to telephone indecency for which they were required to file comments and reply comments within the 30 day reply comment period for this proceeding. Both parties assert that the extension will permit them to submit more meaningful replies that will assist the Commission, and the *ACT II* Court, in compiling a complete record in this proceeding.

3. An opposition to the requests for extension of time was filed jointly by Capital Cities/ABC and others [3] -- the same parties who were granted the initial extension of time in this proceeding. Capital Cities *et. al.* argue that there is an urgent need to resolve this proceeding because they contend that the Commission's current daytime enforcement of broadcast indecency unconstitutionally chills protected speech. They argue further that neither AFA nor Salem have provided "compelling justification" for a further extension of time as required by the first extension of time *Order*.

4. Contrary to Capital Cities' assertion, we believe there is compelling justification for the grant of additional time. Salem requests the extension to "analyze and critique positions and factual assertions set forth in the initial comments."[4] Among these factual assertions, are a study on parental supervision and research on harm to children from indecent broadcasts submitted by Capital Cities *et. al.* As we stated in our *Notice*, we are particularly interested in factual studies, data and research regarding the validity of a 24-hour ban. We are equally interested in whether the data and research submitted in the initial comments are valid. Thus, we believe that providing parties with additional time to permit them to critically review and react to such studies and research will further the Commission's goal of developing a complete and reliable evidentiary record in this proceeding.

5. We also reject Capital Cities' argument that urgent resolution is required because the Commission's daytime enforcement standard unconstitutionally chills protected speech. We agree that this proceeding should be resolved promptly, but not at the risk of compromising the integrity of the record upon which the Commission and the Court must rely in deciding this critical issue. Moreover, pending Commission action and judicial review, broadcasters are operating under essentially the same enforcement standard that was judicially affirmed and was in effect prior to Congress' adoption of the 24-hour ban. *See FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) and *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

6. Accordingly, IT IS ORDERED that the Motions for Extension of Time ARE GRANTED.

7. IT IS FURTHER ORDERED that the time for filing reply comments in this proceeding IS EXTENDED by 30 days to April 19, 1990.

8. This action is taken pursuant to authority found in Sections 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, and Sections 0.204(b), 0.283, and 1.46 of the Commission's Rules.

9. For further information concerning this proceeding, contact Marilyn Mohrman-Gillis, Policy and Rules Division, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

FOOTNOTES

[1] *See Order Extending Time To File Comments* in MM Docket No. 89-494, 55 Fed. Reg. 2236 (Jan. 23, 1990).

[2] The motion was filed jointly by American Family Association, Inc., Children's Legal Foundation, Inc., Advent Christian General Conference, Assembly of God, Baptist General Conference, Associate Reformed Presbyterian, Catholic Center, Central Presbyterian Church, Christian Standard, Conservative Baptist Association, Conservative Congregational Christian Conference, Diocese of Eau Claire, Evangelical Free Church of America, General Association of General Baptists, General Conference of Mennonite Church, International Pentecostal Church of Christ, Missionary Church, North American Christian Convention, Open Bible Standard Churches and Wesleyan Church.

[3] The motion was filed by Capital Cities/ABC, Inc., CBS Inc., Action for Children's Television, American Civil Liberties Union, Association of Independent Television Stations, Inc., Radio-Television News Directors Association, Infinity Broadcasting Corp., Motion Picture Association of America, Inc., National Association of Broadcasters, National Broadcasting Company, Inc., National Public Radio, People for the American Way, Post-Newsweek Stations, Inc., Public Broadcasting Service, The Reporters Committee for Freedom of the Press, Recording Industry Association of America, and Society of Professional Journalists.

[4] *See Salem Motion for Extension of Time* at 3.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-172

In re Applications of

JANICE FAYE SURBER — File No. BPH-870313NB

FATE LAMONT McANALLY — File No. BPH-870313NE

For Construction Permit for a
New FM Station on Channel 274A
in Jellico, Tennessee

Appearances

Dennis F. Begley and *Cheryl A. Kenny*, on behalf of Janice Faye Surber; *Russell C. Powell*, on behalf of Fate Lamont McAnally; and *James Shook*, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
JOSEPH CHACHKIN

Issued: March 20, 1990; Released: March 28, 1990

PRELIMINARY STATEMENT

1. This case involves two applicants, Janice Faye Surber (Surber) and Fate Lamont McAnally (McAnally), for a new FM broadcast station to operate on Channel 274A at Jellico, Tennessee. The Surber and McAnally applications were designated for hearing by *Hearing Designation Order*, DA 88-476 (released April 15, 1988) on the following issues:

> 1. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 2. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

2. *By Memorandum Opinion And Order*, FCC 88M-4005 (released November 25, 1988), the following issue was added against Surber:

> To determine all of the facts and circumstances relating to the certification of Janice Faye Surber as to her financial qualifications to construct and operate the proposed facility and, whether, in light of the evidence adduced, she misrepresented facts or was lacking in candor with this Commission, and whether she has the requisite qualifications to be a broadcast licensee.

The burdens of proof and proceeding were placed on Surber. *Id.*

3. Prehearing conferences were held on July 8, 1988 and June 2, 1989. *Order Prior to Prehearing Conference*, FCC 88M-1172 (released April 20, 1988) and *Order*, FCC 89M-1540 (released May 30, 1989). Hearing sessions were held September 6 and 7, 1989. A further conference was held September 18, 1989 at which time the record was closed. *Order*, FCC 89M-2310 (released September 20, 1989). Proposed findings of fact and conclusions of law were filed on November 3, 1989; replies were filed on November 17, 1989.

FINDINGS OF FACT

Financial Misrepresentation Issue Against Janice Faye Surber

4. At the time Surber filed her application for the Jellico station on March 13, 1987, she had not yet made arrangements for the availability of funds necessary to construct and initially operate her station. Thus, she did not certify that she was financially qualified. However, shortly after her application was filed Surber compiled estimates of construction and initial operation costs, obtained what she then-believed was a reasonable assurance of a loan to cover those costs, and amended her application, on April 27, 1987, to certify that she was financially qualified (Surber Ex. 2, p. 1).

5. Surber prepared a written estimate of the costs to build and operate her station (Surber Ex. 2, pp. 1, 7-10). She obtained equipment quotes from various companies, relying primarily upon an equipment proposal from Harris Corporation (Surber Ex. 2, pp. 1, 11-28). On some items, such as the transmitter and antenna, she relied upon figures for used equipment, rather than upon the Harris Corporation proposal. Surber estimated the cost for a used transmitter by reviewing classified advertisements for used radio equipment in broadcast magazines. To determine the costs of a used antenna, she telephoned an equipment company in Nebraska to obtain a quote (Surber Ex. 2, p. 1). Surber planned that her husband, Ted Surber, who has an electronics background, would install the equipment. Mr. Surber would be assisted by an engineer who would oversee the work and help him with it (Tr. 177, 182).

6. Ms. Surber then considered the type of programming she would broadcast and came up with a daily programming schedule (Surber Ex. 2, pp. 2, 29-32). She planned to start operating 18 hours a day and then, later in the first year -- but after the first three months -- increase the broadcast time to 24 hours (Tr. 171, 206-207). Although she planned to have local news and public service announcements, Surber also planned to rely upon a substantial amount of pre-recorded and, eventually, satellite-fed programming, primarily of a religious nature. Surber, who already owned a satellite dish, discussed the availability of satellite programming with other radio stations (Tr. 174-176). She planned to begin carrying satellite programming within the first year of operation, when she expanded to 24 hour operations (Tr. 206-207). Surber's programming plan entered into her deliberations as to how many people would be necessary to staff her station (Surber Ex. 2, p. 2; Tr. 206-207).

7. In estimating staffing costs, Surber planned on working full-time without a salary as the general manager. She tried to break down the hours during which she would be at the station, as well as to plan when she would work primarily on certain functions, such as announcing duties and production. She also planned to do administrative, bookkeeping and traffic tasks. Surber planned to be at the station six days per week, 11 1/2 hours per day, from 6:00 a.m. to 6:00 p.m., and to be "on call" on Sundays (Surber Ex. 2, 33-34; Tr. 206). Surber also planned on her teenage son acting as an announcer after school, and her husband, Ted, announcing when he was available during the evenings, as well as providing any necessary technical advice. (Surber thought she would hire an engineer at some later point.) Neither Surber's husband nor her son would receive any pay for their activities. Additionally, Surber planned to hire a part-time announcer-operator. She did not include sales people in her budget since she planned that any sales persons would work on commission (Surber Ex. 2, p. 2; Tr. 164-165).

8. Surber estimated that she would need approximately $85,000-$90,000 for construction and initial operation of her station (Surber Ex. 2, p. 4).

9. Ms. Surber understood from her reading of the FCC application form regarding the certification of financial qualifications, that FCC requirements could be met by either a bank loan letter or by an oral "commitment" from a bank official (Tr. 78-80, 83). Surber's recollection is that she and FCC counsel may have discussed obtaining a letter from a bank to become financially qualified (Tr. 83). Counsel did not indicate that "reasonable assurance" of a loan had to be in writing. Surber did not discuss with her attorney her belief that an oral "commitment" would be sufficient to meet the FCC's requirements (Tr. 81). Moreover, in her review of the application form, Surber did not see anything indicating "reasonable assurance" had to be in writing (Tr. 211).

10. Ms. Surber first contacted a bank regarding the possibility of financing for her station in early March 1987, before her application was filed. At that time, Ms. Surber went to Farmer's National Bank (FNB), where she and her husband had had savings and checking accounts for about ten years, to borrow $2,500 for the costs of her engineering and legal fees for the Jellico application (Tr. 89-90, 95, 109-110). She spoke to FNB loan officer Paul Raines about the purpose of the loan and FNB provided Ms. Surber with that loan without requiring any financial information or collateral from her (Tr. 84, 86, 110, 113, 217). (That loan was repaid in six months. Tr. 110.) During her discussions with Raines regarding the $2,500 loan, Ms. Surber mentioned her need for money to construct and operate the proposed Jellico station. Mr. Raines then made the general statement that the bank did not make loans to radio stations (Tr. 87-88, 116-117, 216). In light of that statement, Ms. Surber did not ask for a loan letter from FNB (Tr. 85, 87-88). Soon thereafter, Ms. Surber filed her Jellico application, in which she conceded that she was not yet financially qualified (Tr. 90).

11. After her application was filed, Ms. Surber contacted two other banks regarding the availability of financing. She spoke to Dennie Byrd, a loan officer at First Federal Savings and Loan, about obtaining a bank loan commitment letter. He told her the savings and loan association did not make such loans, but rather specialized in residential mortgages (Tr. 86, 89). Ms. Surber also asked Nick Gwerie, a loan officer at the Bank of Williamsburg, for a bank loan letter. Mr. Gwerie told her that the bank would get back to her (Tr. 86-87, 89-90).

12. Janice Surber told her husband of 19 years, Ted Surber, about her discussions with the loan officers from the Bank of Williamsburg and First Federal Savings and Loan (Tr. 120, 209). She then asked Ted if he would speak to J. Will Sharp, a close friend of Ted's, and an FNB director, stockholder and executive loan committee member, about her obtaining a loan from FNB (Tr. 120, 129). Mr. Sharp had not been in town in early March 1987, when Surber spoke to FNB's Mr. Raines, but had returned to the area from Florida by mid-April 1987 (Tr. 125-126).

13. Janice Surber testified that the policy in her small town was that a bank official could authorize a bank loan, and that "if a bank official says that they will loan you the money, then that is all you need" (Tr. 82, 84, 107, 124). Surber believed that individual directors of the bank had the power to arrange loans (Tr. 124). Further, Surber believed that Sharp was not only a shareholder and loan committee member, but also chairman of the FNB Board of Directors, and that, as chairman, he was a bank "officer." Thus, Ms. Surber believed that Sharp was in a position to authorize a bank loan on his own without even having to go through a loan committee (Surber Ex. 2, p. 3; Tr. 87, 107, 125, 187, 202).

14. Loron Baker, FNB's President, confirmed that Mr. Sharp was, indeed, a shareholder, director and one of six members of the loan executive committee, although not its chairman (McAnally Ex. 5, p. 1; Tr. 324-325, 333). Mr. Baker testified that the function of each loan executive committee member, (all of whom were also directors) now and in April 1987, was to review loan proposals and advise on whether it appeared a loan would be approved (McAnally Ex. 5, p. 1; Tr. 314). Indeed, they were supposed to try to generate new business by finding qualified customers, such as people whom they already knew, for loans (Tr. 328-329). The recommendation of a director to a loan officer would increase the chances of a loan being approved by FNB's loan committee. *Id.* Therefore, Mr. Baker agreed that while Sharp did not have the power to issue a bank letter because he was not a bank officer, he did have the power to indicate to the Surbers whether a loan might be approved, subject, of course, to final approval by the FNB loan committee (Tr. 315, 324-325). Baker also testified that in April 1987, and continuing to the present, bank officers do have the authority to make certain loans without approval of the loan committee (Tr. 331).

15. When Ted Surber told his wife that he believed that, more than likely, Mr. Sharp would be able to help her regarding financing, Janice Surber asked him to speak with Mr. Sharp on her behalf (Tr. 120). Mr. Sharp had known Ted Surber all of Ted's life (Tr. 117). Sharp had been a neighbor of Mr. and Mrs. Johnson, who had raised Ted (Surber Ex. 2, p. 4; Tr. 209). Sharp had helped Ted in various endeavors all of his life and "always seemed to look after him." When Ted was a child, Mr. Sharp had brought to market calves Ted had raised. He also had helped Ted obtain a summer job with the Soil Conservation program. And, he had helped Ted get a job with the county (Tr. 209, 223-224).

16. Mr. Sharp knew what the Surbers' assets were (Tr. 96). He had assisted the Surbers in purchasing their home, which had previously belonged to Sharp's uncle,

and so was aware of its value (Tr. 103-104, 135, 233). Mr. Sharp also was aware of the Surbers' checking and savings accounts with FNB (Tr. 103-104, 135-136). And, as the administrator of an estate left to Ted Surber in 1986 through the will of Mrs. Ollie Johnson, Mr. Sharp was intimately familiar with the assets Ted received and would continue to receive from that estate (Surber Ex. 2, p. 4; Tr. 96, 100, 103-104, 149).[1] Mr. Sharp also knew of Ms. Surber's business and educational background, including the facts that she once had owned her own yarn shop and that the Surbers had once owned an electronics shop (Tr. 104, 106, 182). *See* ¶ 42, *infra*.

17. Although Mr. Sharp had a good relationship with Ted Surber, there were some personal differences between he and Janice Surber, stemming from her relationship with the Johnsons (Tr. 128-129, 144). Mr. and Mrs. Johnson had raised Ted after his mother left him when he was two-years old (Tr. 96, 144-145, 150). Mrs. Ollie Johnson is actually Ted Surber's one-half great aunt (Tr. 150). Janice Surber is not a blood relative to either of the Johnsons (Tr. 150).

18. Beginning in the mid-1970's, after Mr. Johnson lost his eyesight, Janice Surber visted him every day, taking him various places, including to the doctor (Tr. 150-151). Then Mr. Johnson developed cancer (Tr. 151). For 18 months before he died in 1983, Janice Surber took care of Mr. Johnson, visiting him three times a day to perform nursing duties that "only wives do," such as bathing him and taking care of his colostomy (Tr. 144-145, 151). Although Mrs. Johnson herself could not perform those duties for her husband, she was of the "old school" that believed it was "dirty" for anyone other than a wife to perform such duties (Tr. 144-146). Moreover, when Mr. Johnson was in the hospital with cancer, Janice Surber had stayed with him day and night, even helping to give him a shower before his surgery (Tr. 151-152). This Mrs. Johnson resented (Tr. 152). Finally, during Mr. Johnson's last weeks of life, when his wife would not respond to his requests for food and water, he asked Janice Surber to help and Janice responded by moving into the Johnsons' house to nurse Mr. Johnson. Mrs. Johnson, however, felt that Janice Surber's presence was an intrusion (Tr. 146-147).

19. Mrs. Johnson conveyed to Mr. Sharp her feelings about what she felt was the inappropriateness of Janice Surber's actions (Tr. 145-150). Mr. Sharp, who like Mrs. Johnson was of a different generation than Ms. Surber, also felt that Janice should not have helped Mr. Johnson with such personal matters (Tr. 154-155).

20. Also affecting the relationship between Janice Surber and Mr. Sharp was an incident that occurred in 1986, when Janice Surber was caring for the very ill Mrs. Johnson (Tr. 152). During that time, an emergency situation arose in which Janice Surber felt she had to take Mrs. Johnson to the hospital for surgery (Tr. 147, 154). Mr. Sharp believed that Mrs. Surber should have called him first for "authorization" (Tr. 147-148).

21. Janice Surber believes Mr. Sharp thinks she is "headstrong" and does things "on her own" (Tr. 147-148). She said that since Mr. Sharp is also "headstrong," they have a personality clash when it comes to other than "just friendship" (Tr. 153). In spite of this, Janice Surber is not unwelcome in Mr. Sharp's home (Tr. 129, 223). Thus, Ms. Surber believed that Mr. Sharp's opinion of her would not affect his opinion on the availability of a bank loan for her station (Tr. 129). However, she felt that it would be better if she was not at the meeting with Mr. Sharp. *Id.* By having Ted Surber speak to Sharp on her behalf, it was felt that Janice Surber would be "putting her best foot forward" (Tr. 224).

22. Janice Surber told Ted she needed a letter or some kind of assurance that she could obtain a loan for construction and operation of her station (Tr. 217, 224). She had discussed with Ted the amount she would need and that she would be willing to put up her home and the station's assets as collateral (Surber Ex. 2, p. 4). In mid-April 1987, a few days after her visit to the Bank of Williamsburg (Tr. 120, 218), Mr. Surber spoke with Mr. Sharp about Janice's plan for the radio station (Tr. 224-225). When he told Sharp that FNB loan officer, Mr. Raines, had said FNB did not loan money to radio stations, Sharp said he thought that was "funny" since Mr. McAnally has a loan for his Williamsburg, Kentucky AM radio station from FNB (Tr. 230-231). The existence of this loan to McAnally for his radio station was confirmed by FNB's president, Loron Baker (Tr. 300).

23. Ted Surber told Mr. Sharp that Janice Surber would offer her home and the station's assets as collateral for the FNB loan. He testified Mr. Sharp noted that someone willing to put up everything they have as collateral for a loan is more likely to pay it back, making the loan more attractive to the bank (Tr. 225-226). Mr. Surber asked Mr. Sharp for a bank loan letter. Sharp said that if Janice already had the construction permit there would be no problem with a letter, but he did not want to tie up the loan money for the years it might take Janice to obtain that permit (Tr. 218-219). Mr. Surber tried to explain to Mr. Sharp that the bank letter need not give a legal commitment for funds, just a reasonable assurance, but felt Sharp did not appear to understand the distinction (Tr. 219-220). When Ted Surber realized Mr. Sharp would not provide Janice with a bank letter, he asked Mr. Sharp, "point blank," whether Janice would obtain a loan if she were to get the Jellico construction permit. Mr. Sharp responded there would be no problem with obtaining a loan (Tr. 226-227). Ted Surber did not recall discussing with Mr. Sharp the interest rate of the loan or monthly payments but they did discuss the amount of the loan and the collateral available (Surber Ex. 3, pp. 1-2; Tr. 225, 233). Mr. Sharp made what Ted considered to be a "standard statement" that he could not actually give approval of the loan itself since he was only one member of the FNB loan committee (Tr. 228). Sharp said a loan application would have to be sent to the loan committee when Janice Surber got the construction permit (Surber Ex. 3, p. 2; Tr. 242).

24. Ted Surber then told Janice just "the bare things" that she was interested in -- primarily that Mr. Sharp said there would be no problem with her getting a loan -- when he relayed to her his conversation with Mr. Sharp (Tr. 232). Ted told Janice he had discussed with Sharp her plans for the station, the availability of her house and the station equipment as collateral, and the amount of the loan (Surber Ex. 2, p. 4; Tr. 133). Ted also told her that Mr. Sharp did not want to provide a letter so as not to tie up money, but had said there would be no problem with Janice obtaining a loan from the bank (Tr. 84, 86, 133-134, 228, 232). Ted advised Janice that Sharp said she would have to file a formal loan application at the time she received the construction permit (Surber Ex. 2, p. 4; Tr. 134). Janice Surber does not recall Ted saying any-

thing about Mr. Sharp not having authority to authorize a loan and that she would have to go to a loan committee for assurance (Tr. 186).[2]

25. Based upon what Ted Surber told her of his conversation with Mr. Sharp, Janice Surber believed that she had the necessary reasonable assurance of funds to construct and initially operate her station (Surber Ex. 2, p. 5; Tr. 86). She felt that Mr. Sharp's verbal assurance was as good as a loan letter, making it unnecessary to obtain a loan commitment letter (Surber Ex. 2, 5; Tr. 86, 107). Therefore, she did not try to re-contact the Bank of Williamsburg for a letter or to seek a loan letter from any other bank (Tr. 118). Surber told FCC counsel that she had obtained reasonable assurance of financing and asked him to send her the paperwork necessary to amend her financial qualifications certification. Janice Surber's amendment certifying to her financial qualifications was filed April 27, 1989 (Surber Ex. 2, p. 1; Tr. 92, 128).

26. In May 1988, after FCC counsel discovered that Janice Surber did not have a bank letter and advised her to obtain one, Janice Surber spoke with Mr. Sharp. At that time she first discovered that he had not been with FNB since December 1987 (Tr. 132, 187-188). Mr. Sharp told Janice that she should contact Butch Steely, the new chairman of FNB's board of directors, and that Steely would take care of her need for a bank letter (Tr. 187-188). Ms. Surber contacted Mr. Steely, advising him that Sharp had said that there would be no problem in her getting a loan and that she should see Steely about a loan letter (Tr. 190-191). Mr. Steely directed Janice Surber to Carroll Yates, Vice President of FNB, saying Yates would give her what she needed (Tr. 189-191). Janice Surber then met with Mr. Yates and asked him for a loan letter. Yates asked Ms. Surber about her assets and she gave him a financial statement (Tr. 190-204). Mr. Yates also indicated he was aware of the FNB trust account for Ted Surber. Yates said that he would take care of Janice's need for a letter, and told her to call the next day to pick up the letter (Tr. 190, 204).

27. Janice Surber gave Mr. Yates a sample bank reasonable assurance letter (Tr. 133). However, after Yates reviewed the letter with FNB President Loron Baker, Baker felt that the sample letter implied a possible legal ramification regarding a loan. Thus, Yates and Baker revised the letter to ensure that FNB would have no legal obligation to make the loan (Tr. 333-334).

28. On June 2, 1988 Janice Surber obtained from Mr. Yates a letter referring to her request for a loan to construct and initially operate her station. In that letter Yates said that, after reviewing Surber's financial statement, he felt FNB "would have an interest in financing the project," although the bank reserved the right to "re-evaluate" her request at the time of the loan (Surber Ex. 5; Tr. 204).

29. On June 21, 1988 Mr.McAnally filed his petition to enlarge issues seeking financing and financial misrepresentation issues against Surber. Included with his petition was a declaration from Mr. Baker commenting on Mr. Yates' June 2, 1988 letter. Baker's declaration said that the Yates letter was strictly an "accommodation" to Janice Surber and was not intended as a present firm commitment to provide a loan. The declaration further stated that the letter was purposefully drafted in an ambiguous manner to ensure that it created no obligation on behalf of the bank, and that if Janice Surber "were to apply for a loan" from FNB "based upon the information that she presented to Mr. Yates" Baker believed her application would be denied. Finally, Mr. Baker noted that the loan Janice Surber requested could not be approved without the consent of the bank's executive loan committee (Surber Ex. 4).

30. Baker's declaration had been prepared at McAnally's request (Tr. 303). Baker had first met McAnally shortly after Baker started working for FNB, in May 1987 (Tr. 298, 403). McAnally had checking and savings accounts with the bank, as well as two or three loans (Tr. 299, 403-404). Mr. Baker had helped McAnally take out a loan in 1987 for his AM radio station (Tr. 299-300, 302-303).

31. In obtaining the declaration, Mr. McAnally had told Mr. Baker that he had applied for the Jellico FM license and that there was some dispute over whether Janice Surber had complied with FCC regulations. He told Baker that Surber had represented to the FCC that she had a "firm loan commitment" or "binding contract" with FNB to obligate funds for construction and operation of the station (Tr. 304-306). Baker testified he told McAnally that FNB had expressed an interest in making the loan to Surber (Tr. 311-312),[3] but because he was concerned that the bank not have a binding commitment, he provided McAnally with his declaration that the Yates letter was an "accommodation" to Surber. Mr. Baker explained at hearing that his description of the letter as an "accommodation" referred to the fact that the letter was an initial contact indicating a possibility that Ms. Surber would obtain a loan and that the bank had an interest in making it, based upon Yates' initial review of Ms. Surber's financial statement (Tr. 307-308, 311).

32. Mr. Baker testified that although Yates, as an officer, was authorized to issue the June 2 letter, that letter was not legally binding (Tr. 310-311) and before a loan could actually be advanced, Surber's loan request would have to go to the loan executive committee for final approval (Tr. 313-314). Baker described the Yates letter as an invitation to pursue the matter further, an expression of preliminary interest, and testified that if Surber met all of the bank's requirements she could get a loan (Tr. 332). Baker testified he was not sure whether McAnnally had ever discussed with him the concept of "reasonable assurance" rather than an enforceable loan commitment (Tr. 322).

33. Mr. Baker also provided written hearing testimony, again at McAnally's request, because McAnally wanted to make known the circumstances regarding whether Ms. Surber had a "loan commitment" at FNB – that is, something that was "final and approved" (McAnally Ex. 5; Tr. 310-311). In his written testimony, Mr. Baker referred to Mr. Sharp's lack of authority to give a "commitment" for a loan to Surber and said that Sharp had never indicated to him that he believed he had any authority to "commit" to loans (McAnally Ex. 5, pp. 1-2). Baker explained at hearing, however, that his references to a "commitment" referred to a written, legally binding contract to provide a loan (Tr. 321-322). Moreover, while Baker's written testimony states that Ms. Surber had not provided the information, such as an independent appraisal of the collateral and revenue projections necessary to obtain a "commitment," at hearing, Baker explained that such information was only necessary to obtain a final, legally binding approval after examination by the loan committee. Such information was not necessary to obain a preliminary expression of interest in making a loan, such

as was provided by the Yates letter (Tr. 316, 344). Baker noted that executive loan committee members were usually not even aware of the existence of letters of interest such as the Yates letter (Tr. 341).

34. Surber is no longer relying upon the Yates letter for her financial qualifications (Tr. 204). Ms. Surber has obtained a letter, dated July 7, 1988, from the Bank of Williamsburg providing reasonable assurance of the availability of financing for construction and operation of her station.

35. After the financial misrepresentation issue was specified against her, Surber obtained a subpoena from Chief Administrative Law Judge Fitzpatrick requiring Sharp to attend a January 10, 1989 deposition in Washington. However, when Surber's counsel discovered from Mr. Sharp that he was ill and found it difficult to travel, Surber arranged for Sharp's deposition to be taken by telephone from Mr. Sharp's Florida community of residence. Sharp was then served with another subpoena issued by Judge Fitzpatrick requiring his attendance at the telephone deposition.

36. On January 5, 1989, Surber's counsel was advised that Mr. Sharp's daughter had contacted Ms. Surber and said Mr. Sharp was terminally ill and would not take part in any deposition. Counsel then spoke with Ms. Sharp and Mr. Sharp's pharmacist, both of whom said he was ill, had problems with his memory, and would not be deposed. Surber's offers to hold the deposition at Sharp's residence or to take discovery by written interrogatories were refused. As a final accommodation, Surber agreed to withdraw her deposition subpoena on the promise that she be provided a notarized statement from Sharp's doctor detailing his condition and the impact on his mental state of the medications he was taking. *See* Surber's "Motion for Withdrawal Of Subpoena" filed January 9, 1989. Surber's numerous demands for such detailed information were not met. *See* Surber's "Opposition to Motion to Quash Subpoena" filed August 30, 1989.

37. On June 7, 1989 Surber requested and obtained a subpoena requiring Mr. Sharp to appear for oral testimony at the September hearing. However, Sharp, through counsel, filed a motion to quash the subpoena on August 28, 1989. In that motion, Sharp represented that he suffers from cancer, diabetes, hypertension and cardiovascular disease and was in severe pain. It was also represented that Sharp is taking multiple medications. On August 30, 1989 Surber opposed Sharp's motion to quash, noting that her repeated attempts to obtain full details on Mr. Sharp's mental and physical condition had not been successful. By *Order*, FCC 89M-2204 (released September 6, 1989), the Presiding Judge granted Sharp's motion to quash. The Presiding Judge held, however, that Sharp's hearing testimony could be taken by speakerphone if all parties agreed. The Judge noted that if such testimony were given, Sharp should furnish affidavits from his doctors detailing the medications Sharp has been taking and the impact of such drugs on Sharp's mental state.

38. On September 13, 1989, Sharp's counsel provided the parties and the Presiding Judge with a brief declaration, dated September 8, 1989, from one of Sharp's physicians, Dr. Robert Miller. Dr. Miller stated that Mr. Sharp was on Dilaudid, a very strong narcotic, which "may impair his memory somewhat and occasionally can cause confusion." Dr. Miller noted that Mr. Sharp also takes Decadron, which "may also affect the clarity of his thinking." Dr. Miller recommended Mr. Sharp not be subjected to "prolonged stress" in light of his medical problems and his being medicated.

39. On September 18, 1989, the Presiding Judge held a hearing conference to determine whether Mr. Sharp would testify by speakerphone. Surber determined that, in light of the medications Sharp was taking and the potential for impaired memory loss and confusion, there was substantial doubt that Mr. Sharp's testimony by speakerphone would be valuable and reliable, particularly because the parties and the Presiding Judge would be unable to observe Mr. Sharp's demeanor (Tr. 410-411). Accordingly, Mr. Sharp did not testify. Sharp has since died. *See* "Statement For The Record" filed November 29, 1989 by Surber.

40. McAnally made no effort to depose Mr. Sharp (Tr. 281). He did proffer at hearing exhibits a declaration from Mr. Sharp and a transcript of a telephone conversation with Sharp (Tr. 376-378). Although he was advised, well before the hearing, that those exhibits would not be received unless Mr. Sharp was produced for hearing (Tr. 284-285), McAnally did not subpoena Sharp to testify or otherwise make him available for cross examination (Tr. 280). Accordingly, the proffered exhibits were rejected (Tr. 377-379). McAnally's counsel stated at hearing that Mr. Sharp was not called as a witness by McAnally because counsel "didn't think [his testimony] was essential," and that he did not think Sharp's testimony, "at least insofar as the Surbers' direct case was concerned, was necessary" (Tr. 283-285). McAnally's failure to take steps to have Mr. Sharp testify or even to indicate any interest in calling him as a witness was noted by the Presiding Judge at hearing (Tr. 278-279, 287).

Standard Comparative Issue

Janice Faye Surber

41. *Integration*. Surber is an individual applicant for the Jellico FM radio station (Surber Ex. 1, p. 1). Ms. Surber is a high school graduate and was a full-time student at Cumberland College for four semesters (Tr. 106).

42. For about a year, from August 1972 to March 1973, Ms. Surber owned her own yarn and material shop in Williamsburg, Kentucky. (She closed the shop upon advice from her doctor when she became pregnant). (Tr. 104-105). From 1975 to 1980, Ms. Surber and her husband owned an electronics shop, operating it from their home. Ms. Surber was the bookkeeper, sold equipment, wired microphones and even installed radios and antennas while operating that shop (Tr. 182, 207-208).

43. Ms. Surber has had other positions in sales, secretarial and bookkeeping fields (Tr. 105). She also has had unpaid employment. *Id.* Surber currently is a homemaker and therefore will not have to discontinue any paid employment activity in order to integrate at the Jellico station (Surber Ex. 1, 2). She currently is a volunteer program production assistant for the Mountain Ash Baptist Church, where her duties include producing religious programs for cablecast on community access channels for cable systems in Jellico, Tennessee and Williamsburg, Kentucky. Ms. Surber will terminate her cable production volunteer work if her application for the Jellico station is successful. *Id.*

44. Ms. Surber plans to work full-time, a minimum of 40 hours per week, as general manager of the Jellico station. As the sole owner and its general manager, she will have overall managerial responsibility for, and authority over, all aspects of station operation, including programming. All station personnel will report to her and she will have ultimate responsibility for hiring and firing employees (Surber Ex. 1, p. 1).

45. Ms. Surber is a white female. She currently resides in a rural area between Jellico, Tennessee and Williamsburg, Kentucky, located within the proposed service area of the Jellico station. She has lived at that residence for about 17 years (Tr. 235), and plans to continue residing there while integrated at the Jellico station. *Id.*

46. Ms. Surber's civic activities in Jellico and in the service area, are as follows:

(a) Cub Scout Leader, Jellico, Tennessee, 1981-1983.

(b) Cub Scout Leader, Williamsburg, Kentucky, 1986-1987.

(c) Church Secretary and Clerk, Mountain Ash Baptist Church, Williamsburg, Kentucky (the church is actually located between Jellico, Tennessee and Williamsburg, Kentucky), 1978-present.

(d) Program Production Assistant, Mountain Ash Baptist Church, Jellico, Tennessee, 1984-present.

(e) Member of Parent-Teacher Association, Williamsburg, Kentucky City Schools, 1984-present.

(f) Member of Baseball Boosters, Williamsburg, Kentucky High School, March 1989-present.

Surber Ex. 1, pp. 1-2.

47. *Media Interests*. Neither Ms. Surber not her husband have any interest in or connection with any media of mass communications (Surber Ex. 1, 2).

Fate Lamont McAnally

48. *Integration*. Fate Lamont McAnally also is an individual applicant. He is a high school graduate who, for two years, attended Hiwassee College in Madisonville, Tennessee (McAnally Ex. 1, p. 1 and Ex. 2, p. 1). He served in the U.S. Air Force and, upon discharge, took courses in broadcast-related subjects at the Elkins Institute. Mr. McAnally then began a career in broadcasting at WYGO, Corbin, Kentucky. He has since held various positions, including engineer, announcer, program director, sales manager and general manager, at various stations in Kentucky and Georgia. He also has held an ownership interest in radio stations in those states (McAnally Ex. 2, pp. 1-2). Mr. McAnally currently owns 90% of the stock of Williamsburg Broadcasting Co., Inc., the licensee of daytime AM Station WEKC. WEKC is licensed to Williamsburg, Kentucky, which is about 12 miles from Jellico (McAnally Ex. 3; Tr. 383). McAnally also is General Manager and Chief Operator of that station (Tr 381-382).

49. In his current position as General Manager of WEKC, McAnally works a minimum of 40 hours per week. He works another three-to-four hours per week as WEKC's Chief Operator (Tr. 381-382). McAnally also is a partner, with his wife, in McAnally Enterprises, which operates a Radio Shack store (Tr. 390). McAnally works approximately four hours per week as a sales clerk at his store (Tr. 390-391).

50. By *Order Prior to Prehearing Conference*, FCC 88M-1172 (released April 20, 1988), then-Chief Administrative Law Judge Fitzpatrick directed the parties to exchange integration statements. The Presiding Judge also ordered that "[f]ull disclosure must be made as to whether the integrated principals intend to withdraw from their current employment or business pursuits which require their time and attention." The Chief Judge warned that failure to so disclose "will result in no integration credit being awarded such principals." *Id.*, p. 2 and note 2.

51. On May 2, 1988, McAnally filed his integration statement, stating he would work full-time at the Jellico station. That statement referred to McAnally's ownership of WEKC, but did not reveal McAnally's employment nor did it indicate that he would terminate or curtail his full-time management positions with WEKC (Surber Ex. 8). The integration statement also did not mention Mr. McAnally's work at the Radio Shack store (Surber Ex. 8).

52. Mr. McAnally proposes to work at least 40 hours per week as general manager of the Jellico station, overseeing all aspects of station operation (McAnally Ex. 1, p. 1). In his direct case hearing exhibits, McAnally attempted to provide testimony that he would delegate his current duties at WEKC to an employee, not yet chosen, while he would continue to retain general oversight of WEKC. However, because McAnally's integration statement included no statement as to the termination or reduction of his hours spent in acting as the WEKC General Manager and/or Chief Operator, as required by the Presiding Judge's *Order Prior to Prehearing Conference*, McAnally's hearing testimony on that matter was not admitted into evidence (McAnally Ex. 1, p. 1; Tr. 353-355)

53. Mr. McAnally has broadcast experience (McAnally Ex. 2, p. 1; Findings ¶ 48, *supra*.

54. Since August 1988 Mr. McAnally has rented a residence in Williamsburg, Kentucky, which is located within the proposed service area of the Jellico station. He intends to maintain this residence if he is granted the Jellico construction permit (McAnally Ex. 2, p. 3; Tr. 395). From June 1988 to August 1988 he resided in Goldbug, Kentucky, also located within the 1 mV/m contour of the Jellico station (McAnally Ex. 2, p. 3). From January 1987 until he moved to his current residence in Williamsburg, Mr. McAnally spent an average of four days per week in Williamsburg, Kentucky, within the service area, with the remainder of his time being spent at his residence at Powder Springs, Georgia (McAnally Ex. 2, pp. 3-4). During this time, Mr. McAnally's family resided at the Powder Springs residence. Also, Mr. McAnally's driver's license indicated a Powder Springs address and his tax returns listed Powder Springs as his legal residence. While Mr. McAnally was in Williamsburg during this period, he stayed in motels (Tr. 393-394). For three years prior to January 1977 Mr. McAnally spent approximately four days per month in Williamsburg (McAnally Ex. 3, p. 4).

55. *Media Interests*. Mr. McAnally is the 90% voting stockholder, President and a director of Williamsburg Broadcasting Co., Inc., the licensee of Williamsburg daytime AM Station WEKC. McAnally currently serves as General Manager and Chief Operator of WEKC (McAnally Ex. 3; Tr. 381-382). Mr. McAnally has not

pledged to divest his ownership interest in WEKC (McAnally Ex. 3). And, as noted above, he did not propose in his integration statement to terminate his employment at WEKC.

56. *Auxiliary Power Proposal.* McAnally proposes to install auxiliary power equipment at the Jellico station should he receive the Jellico construction permit (McAnally Ex. 4).

CONCLUSIONS

Financial Misrepresentations

57. The issue added by Judge Fitzpatrick calls for a determination whether Ms. Surber misrepresented facts or was lacking in candor in certifying she was financially qualified to build and operate the proposed facility.[4] A financial misrepresentation issue goes to an applicant's intent. The query is not whether an applicant's financial certification is technically correct, but whether that applicant acted in good faith in making its certification. Thus, it is well established that an intent to deceive is the *sine quo non* of a misrepresentation issue. *Armando Garcia*, 3 FCC Rcd. 1065, 1067 (Rev. Bd. 1988), *rev. denied*, 3 FCC Rcd. 4767 (1988). The mere existence of a mistake in an application without any indication that the applicant meant to deceive the Commission does not elevate the mistake to the level of an intentional misrepresentation. *Valley Broadcasting Company*, 4 FCC Rcd. 2611, 2615 (Rev. Bd. 1989). "Carelessness and a mistake of law are entirely different matters from an intent to deceive." *Gary D. Terrell*, 102 FCC 2d 787, 790 (Rev. Bd. 1980). Rather, misrepresentations involve false statements of fact made with an intent to deceive, while lack of candor involves concealment, evasion and other failures to be fully informative. Both represent deceit, differing only in form. *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983).

58. The record demonstrates that Ms. Surber acted in good faith at all times. There is no evidence which even hints that Ms. Surber intended to deceive the Commission in certifying she was financially qualified. The financial misrepresentation issue is resolved in Surber's favor.

59. In order to demonstrate reasonable assurance of financial qualifications at the time of certification, an applicant must have engaged in "serious and reasonable efforts to ascertain the predictable construction and operating costs." *Northampton Media Associates*, 4 FCC Rcd. 5517, 5518-5519, 66 RR 2d 1246, 1249 (1989). Plainly, Ms. Surber made such efforts here. She prepared a written estimate of the costs, after obtaining equipment quotes and proposals and speaking with other radio stations concerning operation of a station. Surber even came up with a daily programming schedule for her first year of operation. And, in planning how to staff her Jellico station, Ms. Surber drew up a proposed work schedule for herself. Findings, ¶¶ 5-7. In sum, Surber has taken the application process seriously, going to considerable lengths to plan how she will operate her station and to determine the costs for such operation.

60. Similarly, Ms. Surber took seriously her obligation to obtain a reasonable assurance of the availability of funds to cover her estimated costs. She candidly acknowledged, in her March 1987 application, that she did not yet have an assurance of financing. Then, she spoke to the loan officer of two banks about obtaining a reasonable assurance loan letter. When those letters were not quickly forthcoming, Ms. Surber turned to family friend and banker, J. Will Sharp. At the time, however, Ms. Surber did not believe, based upon her reading of the FCC application form, that documentation was required. Nor had counsel advised her that documentation was essential. And, in fact, the Commission has recently held that "reasonable assurance" does not necessarily require contemporaneous documentation. *Northampton*, *supra* at 5518. Accordingly, the fact that Ms. Surber did not obtain documentation of an assurance of funding at the time of her certification does not warrant her disqualification.

61. Similarly justifiable was Ms. Surber's decision to have her husband, Ted, speak to Mr. Sharp on her behalf. Although not unwelcome in Sharp's home, Janice Surber and Mr. Sharp did not see eye-to-eye on certain matters. In contrast, Mr. Sharp was close to Ted and had assisted Ted many times. Findings, ¶ 15. Thus, it was understandable that Janice Surber would want to "put her best foot forward" by sending Ted to seek an assurance of financing from Mr. Sharp.

62. Ms. Surber also acted in good faith when she relied upon her husband's report that Mr. Sharp had assured that she would have no problem in getting a bank loan. Mr. Sharp was not only a bank shareholder, but a director and a member of the bank's loan committee. Thus, in conjunction with his familiarity with the Surbers' financial condition and business background (Findings, ¶¶ 12, 14, 16), Sharp was well-equipped to assess Ms. Surber's chances of obtaining a loan. Indeed, one of Sharp's functions at the bank was to review loan proposals and advise whether they appeared likely to be approved. Findings, ¶ 14. A recommendation from a director had weight, increasing the chances of loan approval. *Id.* Furthermore, Ms. Surber believed that Mr. Sharp was chairman of the bank's board of directors and, therefore, an officer of the bank. She also understood that bank officials -- directors or officers -- could by themselves, authorize loans. Findings, ¶ 13. In actuality, FNB officers are, *and were in 1987*, empowered to authorize loans for certain amounts of money. Findings, ¶ 14. Therefore, while Ms. Surber's understanding that Mr. Sharp was authorized to make a loan was not correct -- he was not actually a bank officer and the amount of the loan Surber sought would have exceeded the 1987 limit -- there plainly was a basis for her mistaken belief. Accordingly, the evidence justifies the conclusion that Ms. Surber acted in good faith when she certified that she had the necessary assurance of financing.[5]

63. Surber's good faith efforts to obtain the requisite reasonable assurance of financing are echoed throughout the application process. When told by her counsel in 1988 that she needed a bank loan letter she obtained one from FNB Vice President Carroll Yates after providing him with her financial statement. Although McAnally thereafter raised concerns about the letter being simply an "accommodation," at hearing it was revealed, through the testimony of FNB bank president Baker,[6] that the Yates letter essentially did provide a "reasonable assurance" of financing and effectively confirmed Mr. Sharp's oral assurance that Ms. Surber would not have a problem obtaining a loan from FNB. For while the Yates letter did not constitute a binding legal commitment, no such commitment is necessary to demonstrate a reasonable assurance. *Form 301, Broadcast Construction Permit Application*, 4 FCC Rcd. 3853, 3859, 66 RR 2d 519, 529-530 (1989).

64. Undoubtedly, the record would have been more complete with testimony from Mr. Sharp regarding just what was said during the conversation between Mr. Surber and Mr. Sharp. As detailed, supra, findings, ¶¶ 35-37, Surber made every reasonable effort to obtain the testimony of Sharp and can not be faulted for Sharp's failure to give evidence. In this connection, Surber did not act in an unreasonable manner in objecting to the taking of Sharp's testimony by speakerphone. Sharp's doctor submitted a statement that his mental state was impaired and he was sometimes confused. The use of a speakerphone would not have allowed the parties and the Presiding Judge to observe Mr. Sharp's demeanor, a major factor in analyzing whether he was competent to testify and his testimony was worthy of belief. Moreover, the Presiding Judge is fully confident that Mr. Surber provided a full and complete rendition of his conversation with Sharp. The Presiding Judge found Mr. Surber and Mrs. Surber to be fully forthcoming and completely truthful in their testimony and their uncontradicted testimony will be fully credited. As is clear from Mr. Surber's testimony, under cross examination from McAnally's counsel,[7] Sharp gave Surber oral assurance of a bank loan from Farmer's National Bank. Sharp's unwillingness to provide the assurance in writing stemmed solely from his unfamiliarity with the niceties of FCC law. Sharp harbored the quaint notion that a bank letter providing "reasonable assurance" of a loan was a legally enforceable instrument requiring the bank to set aside funds for that purpose. Sharp's unwillingness to provide a written instrument is of no consequence since an oral assurance of financing is sufficient to demonstrate a committed source of funds. *Northampton*, *supra*, at 5519.

65. In sum, it may be argued that Ms. Surber may not have "dotted all of her i's and crossed her t's" in obtaining reasonable assurance of financing, but she did not act either irresponsibly or in bad faith. Rather, the record demonstrates that Surber made an honest, good faith effort to meet the FCC's requirements. Since Surber did not make any deliberate misrepresentations regarding her financial qualifications, her disqualification is not warranted. Accordingly, the misrepresentation issue is resolved in her favor and Surber is found basically qualified.

Standard Comparative Issue

Janice Faye Surber

66. Surber is entitled to 100% full-time integration credit, enhanced by her female preference, her long-time residence within the service area, and her civic activities within the service area. Surber has no media interests.

Fate Lamont MaAnally

67. McAnally is not entitled to any integration credit. Despite Judge Fitzpatrick's specific directive to the applicants that they state in their integration statement their plan to terminate or reduce their current employment, McAnally failed to do so. Furthermore, Judge Fitzpatrick specifically put the applicants on notice that the failure to meet that deadline would result in receiving no integration credit. It is clear that Judge Fitzpatrick was within the bounds of his authority in setting such a deadline. In *Kennebec Valley Television, Inc.*, 2 FCC Rcd. 1240, 1242, 62 RR 2d 877, 882 (Rev. Bd. 1987), *rev. denied*, 65 RR 2d 149 (Rev. Bd. 1988), the Board noted that a Presiding Judge has the discretion to refuse to allow an applicant to supplement a filing regarding his intent to resign his current employment in order to effectuate an integration proposal on the theory that such a filing would constitute a belated comparative upgrading.

68. Thus, in evaluating McAnally's integration proposal, he must be charged with the approximately 48 hours per week he currently devotes to WEKC and his Radio Shack business (Findings, ¶ 49), as well as his 40-hour integration proposal. Therefore, his total proposal is to work approximately 88 hours per week. The Commission has stated that it will not credit proposals contemplating 80-hour weeks or two full-time jobs. *Caldwell Broadcasting Corp.*, 100 FCC 2d 115, 125, 57 RR 2d 1039, 1046-1047 (Rev. Bd. 1985), *rev. granted in part on other grounds*, 104 FCC 2d 438 (1986); *Kennebec*, *supra* at 1242, 62 RR 2d at 882. In fact, the Commission has said that 70 hours per week is the level demarcating "the outer bounds of credibility" for a full-time integration proposal. *Jarad Broadcasting Co., Inc.*, 1 FCC Rcd. 181, 189, 61 RR 2d 389, 409 (Rev. Bd. 1986), *recon. denied*, FCC 86R-81 (Rev. Bd., December 23, 1986), *review denied in all material respects*, FCC 87-312 (released October 5, 1987). Therefore, no integration credit will be awarded.

69. However, even if McAnally were awarded 100% full-time integration credit, he would be the comparative loser. McAnally's enhancement for his broadcast experience entitles him to only a very slight plus.[8] He also receives a slight plus for his auxiliary power proposal. Those credits are exceeded by Surber's substantial female preference alone. Further, while Surber is a long-time resident of the service area, McAnally has had only sporadic, part-time and short-term service area residence. Findings, ¶¶ 45, 54. Thus, Surber is entitled to greater credit for the local residence enhancement. Finally, Surber is entitled to additional credit for her civic activities within the service area, while McAnally has not been active in local civic activities. Thus, Surber is entitled to at least a moderate preference over McAnally on the integration and auxiliary power factors.

70. Additionally, McAnally must be awarded a substantial diversification demerit for his 90% ownership and his managerial interest in Standard Broadcast Station WEKC, located only 12 miles from Jellico. Thus, Surber is substantially preferred over McAnally under the important diversification factor, in addition to her integration preference. The public interest is therefore served by a grant of Surber's application.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[9] the application of Janice Faye Surber for a construction permit for a new FM station on Channel 274A in Jellico, Tennessee IS GRANTED; and the application of Fate Lamont McAnally IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTES

[1] The will established a trust, with FNB as the trustee, providing that Ted and his mother, Norma Jean Imhoff, each receive one-half of the income from a 250-acre farm, a house, gas and oil wells on the property, and cash in the bank. That income totals about $5,000-$6,000 per year for Ted (Surber Ex. 2, pp. 38-43; Tr. 97-100, 192-193). Upon the death of Mr. Surber's 62 year-old mother, her percentage of that income will also go to Ted, and, on the death of the last beneficiary, the fund will go to that beneficiary's heirs (Surber Ex. 2, p. 42; Tr. 97).

[2] Findings 22-24 describing the conversation between Surber and Sharp is principally based on testimony elicited by McAnally's own counsel (see Tr. 217-253). The Presiding Judge ruled that the portion of Surber's direct case (Surber Exhibits 2 and 3) relating to Mr. Surber's report to his wife of his conversation with Mr. Sharp would be received for the limited purpose of showing Mrs. Surber's state of mind at the time she certified the applicant was financially qualified (Tr. 32-26, 58-59). However, McAnnally's cross examination of Mr. Surber which went beyond such direct examination is not so limited and is received without limitation to its use.

[3] McAnally claims Baker did not make such a statement (Tr. 406).

[4] Judge Fitzpatrick denied McAnally's request for a financial qualification issue, noting that Surber had obtained a letter dated July 7, 1988 from the Bank of Williamsburg agreeing to provide funds for the construction and operation of the proposed station.

[5] That Ms. Surber decided to go over the head of the first level FNB loan officer, who wrongly claimed the bank did not make loans to radio stations (Findings, ¶ 22), was justifiable since Mr. Sharp was more knowledgable about bank policy and had greater authority than the loan officer. And, the fact is, FNB has loaned money to radio stations, including Ms. Surber's competitor in this proceeding, Mr. McAnally.

[6] McAnally apparently did not advise Mr. Baker about the differences between "reasonable assurance" and a legally binding commitment. Findings, ¶ 32.

[7] As discussed in note 2, on cross examination, McAnally went beyond the direct examination and fully explored Sharp's conversation with Mr. Surber and can not now complain to the unlimited use of such testimony.

[8] *Policy Statement on Comparative Broadcast Hearings*, 1 FCC Rcd 393, 5 RR 2d 1901 (1965).

[9] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-6

In the Matter of

Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules

ORDER

Adopted: March 21, 1990; Released: March 29, 1990

By the Chief, Common Carrier Bureau:

1. On March 16, 1990, the Cellular Telecommunications Industry Association (CTIA) filed a Motion for Extension of Time to File Comments and Reply Comments in the captioned proceeding. In its motion CTIA requests a 30 day extension of the deadline for filing comments from April 2, 1990 to May 2, 1990, and a 30 day extension for the filing of reply comments from April 17, 1990 to May 17, 1990.

2. In support of its request, CTIA states that this proceeding raises a very large number of complex issues of great importance to the public and to CTIA's members, which represent 553 of the 612 MSA cellular systems in the United States. CTIA contends that it needs more time to interact with its carrier members in order that it may formulate an adequate and helpful response. Moreover, the extension is warranted, CTIA maintains, in order to ensure a careful assessment of the important issues involved in this proceeding.

3. Extensions of time are not routinely granted. However, this proceeding does raise complex engineering questions, and we need a complete record in order to formulate final rules. Therefore, CTIA has demonstrated good cause to warrant a grant of at least part of its request. We believe that the grant of a fourteen day extension of time in which to file comments and one additional week for filing reply comments is justified. Such an extension will not substantially delay the Commission's timely consideration of this Rule Making. However, because the five-year expansion periods for existing cellular systems in Metropolitan Statistical Areas continue to run and are currently expiring in a number of these markets, this Rule Making must be resolved expeditiously. Therefore, the request for a 30-day extension is too long and no additional extensions of time will be granted.

4. Accordingly, CTIA's motion for extension of time is GRANTED to the extent indicated herein and otherwise is DENIED. The deadline for the filing of comments in the captioned proceeding is extended to April 16, 1990. The deadline for filing reply comments is extended to May 8, 1990.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-134

In the Matter of

Amendment of the Maritime Services Rules (Part 80) to increase the mileage limit contained in the general exemption for small passenger vessels operated on domestic voyages.

NOTICE OF PROPOSED RULE MAKING

Adopted: March 8, 1990; Released: March 29, 1990

By the Commission: Commissioner Duggan not participating.

I. INTRODUCTION

1. This *Notice of Proposed Rule Making* (*Notice*) proposes to amend Part 80 of the Commission's Rules, 47 C.F.R. Part 80, to exempt U.S. passenger vessels of less than 100 gross tons, not subject to the International Convention for the Safety of Life at Sea, 1974, T.I.A.S. 9352 (Safety Convention), from the radiotelegraph provisions of Part II of Title III of the Communications Act of 1934, as amended (Communications Act). This general exemption would require that such vessels be equipped with certain radio equipment and not be navigated more than 500 nautical miles from the nearest land.

II. BACKGROUND

2. The Commission administers compulsory ship radio requirements for the promotion of safety of life and property at sea in conformance with the Communications Act and the Safety Convention. All U.S. passenger vessels[1] navigated in the open sea that carry or are certificated to carry more than 12 passengers are required by Section 351 of the Communications Act, 47 U.S.C. § 351, to be equipped with a manual Morse code radiotelegraph station. Section 352(b) of the Communications Act, 47 U.S.C. § 352(b), however, gives the Commission the authority to exempt ships from the provision under certain conditions. In an *Order* dated May 8, 1957 (F.C.C. 54-477), the Commission adopted a general exemption for U.S. passenger vessels of less than 100 gross tons (small passenger vessels) not subject to the Safety Convention. These small passenger vessels were exempted from the requirement to carry a manual Morse code radiotelegraph station provided that they complied fully with the requirements of Part III of Title III of the Communications Act and the Commission's Rules, and that they did not navigate more than 50 nautical miles from the nearest land. In an *Order* adopted March 4, 1970 (F.C.C. 70-242), the Commission extended the maximum distance from 50 nautical miles to 100 nautical miles from the nearest land that ships could travel in the course of their voyages and still be eligible under the general exemption.[2]

III. DISCUSSION

3. There are small passenger vessels whose operations take them outside of the 100 nautical mile limit. The Commission's Field Operations Bureau (FOB) has reported that approximately 40 per cent of the small passenger vessels operating in the Gulf of Mexico in support of the offshore oil and mineral industry are certified by the U.S. Coast Guard to operate at distances up to 200 nautical miles from the nearest land.[3] The U.S. Coast Guard notes that these vessels could be certified for open ocean voyages with no limit on their operating distance from the nearest land. The Commission has granted individual exemptions from the radiotelegraph requirements contained in Part II of Title III of the Communications Act (radiotelegraph exemptions) to small passenger vessels operated in support of the offshore oil industry for distances up to 200 nautical miles from the nearest land provided the vessels comply fully with Part III of Title III of the Communications Act and the Commission's Rules and are capable of communicating on the high frequency (HF) channels assigned for distress and safety communications. *See* Section 80.369(b) of the Commission's Rules, 47 C.F.R., § 80.369(b). Additionally, the Commission, in cooperation with the U.S. Coast Guard, has granted individual radiotelegraph exemptions to small passenger vessels operated on long distance fishing trips and on nature expeditions, such as "whale watching," at distances of up to 500 nautical miles from the nearest land. The Commission granted individual radiotelegraph exemptions to these vessels under the same conditions applied to small passenger vessels operating in the Gulf of Mexico in support of the offshore oil industry.

4. The voyages over 100 nautical miles from land under discussion are primarily extensions of the voyages permitted by the general exemption. The general exemption contained in the 1970 *Order* applicable to small passenger vessels not subject to the Safety Convention was granted, in part, because of the size and space limitations of these vessels. These limitations make it impracticable to install radiotelegraph equipment and provide radio officers' quarters to comply with the Communications Act. U.S. passenger vessels subject to the radiotelegraph requirements of the Communications Act that are less than 100 gross tons and are navigated beyond the 100 nautical mile limit are, likewise, limited in size and space and can not easily accommodate radiotelegraph equipment and radio officers' quarters without extensive modification. More important is the fact that satisfactory safety communications can be ensured on voyages over 100 nautical miles from land, just as they are for ships operating under the current general exemption. This can be accomplished by the carriage of high frequency single sideband radiotelephone equipment or satellite communications equipment.[4] Additionally, extending the mileage limit would reduce the administrative burdens imposed on the maritime public as well as the Commission by making it unnecessary for small passenger vessel operators to apply for individual radiotelegraph exemptions.

5. We propose, therefore, to increase the mileage limitation contained in the general exemption for small passenger vessels contained in Section 80.836(a) of the

Commission's Rules, 47 C.F.R. § 80.836(a), from 100 nautical miles to 500 nautical miles. The proposed exemption requires vessels to fit with additional radio equipment in a tiered approach when operated beyond 100 nautical miles. The radiotelephone installation required on vessels operated up to 100 nautical miles from land will remain the same as the present requirements, that is, a very high frequency (VHF) radiotelephone installation and a medium frequency radiotelephone installation. Small passenger vessels operated up to 200 nautical miles from land must have an additional VHF radiotelephone installation and communications capability on all of the distress and safety frequencies listed in Section 80.369(b) of the Commission's Rules. Vessels operated up to 500 nautical miles from land must also have (1) an independent single sideband radiotelephone installation or a ship earth station, (2) communications capability on all of the distress and safety frequencies listed in Section 80.369(a) of the Commission's Rules, 47 C.F.R. § 80.369(a), (3) ship-to-shore communications capability on the frequencies listed in Section 80.369(d) of the Commission's Rules, 47 C.F.R. § 80.369(d), (4) a source of power independent of the ship's main power source available to power the single sideband radiotelephone, and (5) a radiotelephone distress frequency watch receiver with a radiotelephone alarm signal generator for ship-to-ship distress alerting. In addition, vessels in this last category would, on voyages of more than 24 hours, be required to participate in the U.S. Coast Guard's automated mutual-assistance vessel rescue system.

6. This tiered approach of requiring additional communications capability for vessels operating at greater distances from land is consistent with the present rules, our current policy of granting individual exemptions,[5] and with the Global Maritime Distress and Safety System, which requires additional communications capability depending on the area of operation.[6] We seek specific comments on the additional equipment requirements for the distances involved including, power requirements, receiver sensitivity, antenna requirements, and frequency bands that are proposed by this rule making proceeding.

7. We also seek comments on whether there should be greater flexibility permitted in the Commission's Rules pertaining to small passenger vessels. For example, we propose that a ship earth station may be used in lieu of a single sideband radiotelephone for vessels that navigate more than 200 nautical miles from land. Should we permit the use of a ship earth station in place of the single sideband radiotelephone for small passenger vessels operated more than 20 nautical miles from land? Should the general exemption restrict a small passenger vessel's maximum distance from land in instances where the distance is otherwise approved by the U.S. Coast Guard?

IV. INITIAL REGULATORY FLEXIBILITY ANALYSIS

8. Pursuant to the Regulatory Flexibility Act of 1980 (Pub. L. 96-354), *see* 5 U.S.C. § 603, our initial analysis is as follows:

Reason For Action

9. This action pertains to United States small passenger vessels operated on domestic voyages. The proposed rules would increase the mileage limit contained in the general exemption from radiotelegraph requirements for such vessels. The rules would establish a tiered approach of radiocommunications equipment requirements for operation within a 500 nautical mile limit, with additional radiocommunications equipment required at specified distances from land.

Objectives

10. The proposed general exemption would increase the distance within which small passenger vessels could operate without having to obtain formal individual exemptions from the Commission. Implementation of the proposed rules could help avoid unnecessary administrative procedures for both licensees and the Commission, and ensure that such vessels carry adequate safety communications equipment.

Legal Basis

11. The proposed action is authorized under Sections 4(i), 303(f), and 352(b)(3) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(f), and 352(b)(3).

Reporting, Recordkeeping And Other Compliance Requirements

12. None.

Federal Rules Which Overlap, Duplicate, Or Conflict With These Rules

13. Section 80.933(b) of the Commission's Rules, 47 C.F.R. § 80.933(b), overlaps slightly. That section contains a general exemption narrowly drawn in geographic terms, applying only to U.S. small passenger vessels operated not more than 100 nautical miles from Hawaii, the U.S. Virgin Islands, or the Southern California coast.

Description, Potential Impact, And Number Of Small Entities Involved

14. At this juncture, we cannot determine the number of licensees who would choose to avail themselves of the proposed general exemption and its equipment carriage requirements, or the extent to which such licensees would be small entities. In general, implementation of the proposed rules would permit certain licensees to avoid the administrative procedures currently required to obtain an individual exemption. After we have evaluated the comments in this proceeding, we will further examine the impact of the proceeding on small entities and address our findings in the Final Regulatory Flexibility Analysis.

Any Significant Alternatives Minimizing The Impact On Small Entities And Existing Licensees And Consistent With the Stated Objective

15. This *Notice* requests comments concerning alternatives to the equipment required under the proposed general exemption. *See* paragraph 7, *supra*.

V. PROCEDURAL MATTERS

16. The rule amendments proposed herein have been analyzed with respect to the Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501-3520, and found to decrease the information collection burden that the Commission imposes on the public. The proposed general exemption, by increasing the mileage limit within which small passenger vessels could operate without first having to obtain formal individual exemptions from the Commission, could avoid unnecessary administrative procedures for both licensees and the Commission. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

17. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a) of the Commission's Rules, 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. *See* 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. *See* 47 C.F.R. § 1.1203.

18. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. *See* 47 C.F.R. § 1.1202(b). Any person who makes or submits a written *ex parte* presentation must provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

19. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in the proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. *See* 47 C.F.R. § 1.1206.

20. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **May 21, 1990,** and reply comments on or before **June 5, 1990.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street N.W., Washington, D.C. 20554.

21. Authority for issuance of this *Notice* is contained in Sections 4(i), 303(r) and 352(b)(3) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 352(b)(3).

22. A copy of this Notice will be forwarded to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Proposed Rules

Part 80 of Chapter I of Title 47 of Code of Federal Regulations is proposed to be amended as follows:

A. Part 80 - STATIONS IN THE MARITIME SERVICES.

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377, unless otherwise noted.

2. In Section 80.836, paragraph (a) is revised to read as follows:

§ 80.836 General and individual ship exemptions.

(a) All U.S. passenger vessels of less than 100 gross tons, not subject to the radio provisions of the Safety Convention, are exempt from the radiotelegraph provisions of Part II of Title III of the Communications Act, provided that the vessels are navigated not more than 500 nautical miles from the nearest land and are equipped with a

radiotelephone installation fully complying with the provisions of Part III of Title III of the Communications Act and the Commission's Rules.

* * * * *

3. In Section 80.905, paragraphs (a)(2) through (c) are redesignated (b) through (d), a new paragraph (a) is added, paragraph (a)(1) is revised, and new paragraphs (a)(2), (a)(3)(i)-(iii), and (a)(4)(i)-(vii) are added to read as follows:

§ 80.905 Radiotelephone installation.

(a) Vessels subject to Part III of Title III of the Communications Act that operate in the waters described in § 80.901 must, at a minimum, be equipped as follows:

(1) Vessels operating within the communications range of a VHF public coast station or U.S. Coast Guard station which maintains a watch on 156.800 MHz while the vessel is navigated must be equipped with a VHF radiotelephone installation. Vessels must not operate more than 20 nautical miles from the receiving location of such a station.

(2) Vessels operating beyond the 20 nautical mile limitation specified in paragraph (a)(1) of this section, but not more than 100 nautical miles from the nearest land, must be equipped with a medium frequency transmitter capable of J3E emission and a receiver capable of reception of J3E emission within the band 1605 to 2850 kHz in addition to the VHF radiotelephone installation required by paragraph (a)(1) of this section.

(3) Vessels operating more than 100 nautical miles but not more than 200 nautical miles from the nearest land must:

(i) be equipped with two VHF installations meeting the requirements of paragraph (a)(1) of this section;

(ii) be equipped with a radiotelephone transmitter and receiver meeting the requirements of paragraph (a)(2) of this section; and

(iii) be capable of transmitting and receiving distress and safety messages on any of the distress and safety frequencies listed in § 80.369(b).

(4) Vessels operating more than 200 nautical miles but not more than 500 nautical miles from the nearest land must:

(i) be equipped with two VHF radiotelephone installations meeting the requirements of paragraph (a)(1) of this section;

(ii) be equipped with a single sideband radiotelephone capable of operating on any distress and safety frequency in the medium frequency or high frequency bands listed in §§ 80.369(a) and (b), on any of the ship-to-shore calling frequencies in the high frequency bands listed in § 80.369(d), and on at least four of the AMVER HF duplex channels;

(iii) be equipped with either, an additional single sideband radiotelephone installation meeting the requirements of paragraph (a)(4)(ii) of this Section, or a ship earth station capable of voice operation;

(iv) be equipped with a reserve power supply meeting the requirements of §§ 80.917(b), 80.919, and 80.921 capable of powering the single sideband radiotelephone required by paragraph (a)(4)(ii) of this Section;

(v) participate in the automated mutual-assistance vessel rescue system (AMVER) on all voyages of more than 24 hours;

(vi) be equipped with a radiotelephone distress frequency watch receiver as specified in § 80.269; and

(vii) be equipped with an automatic radiotelephone alarm signal generator as specified in § 80.221.

* * * * *

4. Section 80.909 is revised to read as follows:

§ 80.909 Radiotelephone transmitter.

(a) The medium frequency transmitter must have a peak envelope output power of at least 60 watts for J3E emission on 2182 kHz and at least one ship-to-shore working frequency within the band 1605 to 2850 kHz enabling communication with a public coast station if the region in which the vessel is navigated is served by a public coast station operating in this band.

(b) The single sideband radiotelephone must be capable of operating on maritime frequencies in the band 1605 to 27500 kHz with a peak envelope output power of at least 120 watts for J3E emission and H3E emission on 2182 kHz and J3E emission on the distress and safety frequencies listed in § 80.369(b).

(c) The transmitter complies with the power output requirements specified in paragraphs (a) or (b) when:

(1) The transmitter can be adjusted for efficient use with an actual ship station transmitting antenna meeting the requirements of § 80.923; and

(2) The transmitter, with normal operating voltages applied, has been demonstrated to deliver its required output power on the frequencies specified in paragraphs (a) or (b) of this Section into either an artificial antenna consisting of a series network of 10 ohms effective resistance and 200 picofarads capacitance or an artificial antenna of 50 ohms nominal impedance. An individual demonstration of power output capability of the transmitter, with the radiotelephone installation normally installed on board ship, may be required.

(d) The single sideband radiotelephone must be capable of transmitting clearly perceptible signals from ship to shore. The transmitter complies with this requirement if it is capable of enabling communication with a public coast station on working frequencies in the 4000 to 27500 kHz band specified in § 80.371(b) under normal daytime operating conditions.

5. In Section 80.913, paragraphs (b) through (f) are redesignated as paragraphs (c) through (g), a new paragraph (b) is added, and newly redesignated paragraphs (e) and (f) are revised to read as follows:

§ 80.913 Radiotelephone receivers.

* * * * *

(b) If a single sideband radiotelephone installation is provided, the receiver must be capable of reception of H3E and J3E emissions on 2182 kHz and J3E emission on any receiving frequency authorized pursuant to § 80.909.

* * * * *

(e) Any receiver provided as a part of the radiotelephone installation must have a sensitivity of at least 50 microvolts in the case of MF equipment, and 1 microvolt in the case of HF or VHF equipment.

(f) The receiver required in paragraphs (a), (b) or (c) of this section must be capable of efficient operation when energized by the main source of energy. When a reserve source of energy is required pursuant to § 80.905 or § 80.917, the receiver must also be capable of efficient operation when energized by the reserve source of energy.

* * * * *

6. Section 80.923 is amended by revising the first sentence to read as follows:

§ 80.923 Antenna system.

An antenna must be provided in accordance with the applicable requirements of § 80.81 which is as efficient as practicable for the transmission and reception of radio waves. * * *

7. Section 80.931 is amended by revising the first sentence to read as follows:

§ 80.931 Test of radiotelephone installation.

Unless normal use of the radiotelephone installation demonstrates that the equipment is in proper operating condition, a test communication on a required frequency in the 1605 to 27500 kHz band or the 156 to 162 MHz band must be made by a qualified operator each day the vessel is navigated. * * *

FOOTNOTES

[1] "Ships" and "vessels" are used interchangeably in the Communications Act. *See* 47 U.S.C. § 153(w)(1).

[2] *See* Section 80.836(a), 47 C.F.R. § 80.836(a).

[3] Memorandum dated June 14, 1989, from James C. Hawkins, Engineer-in-Charge, New Orleans field office, to Chief, Investigations and Inspections Branch, Field Operations Bureau.

[4] Advances in technology have made other radio equipment equal or superior to manual Morse code. Equipping these ships with modern methods of communication rather than manual Morse code does not reduce their safety or the safety of other vessels. Moreover, because knowledge of Morse code is not required, almost any person on board could operate these systems, thereby providing greater flexibility in distress situations.

[5] *See, e.g., Memorandum Opinion and Order,* FCC 89-42, 4 FCC Rcd 1521 (1989) (exemptions for certain cargo ships).

[6] The Global Maritime Distress and Safety System (GMDSS) is expected to be phased in internationally beginning in 1992. Under the GMDSS, the existing ship-to-ship manual Morse code alerting system will be replaced by a fully automatic ship-to-shore distress alerting system that will use terrestrial and satellite communications systems.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Specialized Mobile Radio Station WNIX 479 Licensed to New England Mobile — LJF-37

ORDER

Adopted: March 21, 1990; Released: March 29, 1990

By the Chief, Private Radio Bureau:

I. INTRODUCTION

1. The Private Radio Bureau has for consideration a petition filed by Mr. Francis J. DiRico (DiRico) on September 14, 1989. DiRico seeks reconsideration of a Bureau action dated August 14, 1989, that dismissed his complaint, initially filed on December 15, 1988, concerning Specialized Mobile Radio (SMR) station WNIX 479 licensed to New England Mobile (New England). In his complaint, DiRico asserted that New England's license for WNIX 479 should be cancelled because the station was not constructed within one year as required by Section 90.631(e) of the Commission's Rules, 47 C.F.R. § 90.631(e). Also before the Bureau are New England's opposition and DiRico's reply to the opposition.[1]

II. BACKGROUND

2. New England was initially granted a license for WNIX 479 on September 17, 1987, with an authorized transmitter site in Johnston, Rhode Island. On August 1, 1988, approximately seven weeks prior to the expiration of the one year construction deadline imposed by Section 90.631(e) of the Rules, New England filed an application to modify the subject station's transmitter location to Cumberland, Rhode Island. The application was accompanied by a statement that New England could not construct at its Johnston site because of "contractual problems." The application was also accompanied by a short spacing agreement from a co-channel licensee located 62 miles away from the proposed modified site and a request for waiver of the 70 mile co-channel separation provisions of Section 90.621(b) of the Rules, 47 C.F.R. § 90.621(b).

3. On October 15, 1988, Stuart Meyer, on behalf of New England, informed the Bureau that WNIX 479 had been constructed by September 6, 1988, within the original one year construction period. Mr. Meyer indicated, however, that the facility had been constructed at the Cumberland site as proposed in the August 1, 1988, modification application because contractual problems prevented construction at the original Johnston site. Mr. Meyer provided assurances that the station equipment would not be turned on until New England's request for the transmitter site relocation was granted. New England's modification application and request for waiver of the co-channel spacing provisions of Section 90.621(b) of the Rules were granted on December 12, 1988.

4. In letters dated December 15, 1988, and January 17, 1989, DiRico advised the Bureau that he found no evidence to indicate that station WNIX 479 was constructed when he visited New England's proposed Cumberland transmitter site on October 20, 1988. DiRico, therefore, asserted that New England's license cancelled automatically in accordance with the provisions of Section 90.621(b) because WNIX 479 was not constructed within one year at either the authorized site in Johnston or the proposed location in Cumberland.

5. On March 29, 1989, the Bureau requested New England to submit documentation to support its reported construction at Cumberland on September 6, 1988. New England responded on May 1, 1989, by providing statements from the equipment vendor and Mr. Roland Plasse, the Cumberland transmitter site owner. In addition, New England furnished copies of its equipment purchase order and cancelled check as proof of payment for the station equipment. This documentation indicates that New England ordered the equipment from an E.F. Johnson vendor on July 21, 1988. The cancelled check for approximately $35,000 was dated December 15, 1988, indicating the equipment was apparently delivered after New England's reported September 6, 1988, construction. The vendor's statement, however, relates that equipment was lent to New England during the interim delivery period so that New England could comply with its construction deadline. This interim construction at the Cumberland tower is confirmed by Mr. Plasse. Consequently, the Bureau concluded that there was no basis to question the credibility of the information submitted by New England.[2]

6. In its August 14, 1989, determination, the Bureau advised DiRico that the evidence submitted by New England supported its contention of its September 6, 1988, construction at Cumberland. The Bureau noted, however, that the construction issue was not the determining factor in dismissing DiRico's complaint. Rather, the Bureau stated that implicit in New England's requests for transmitter modification and waiver of the co-channel spacing provisions of the rules, made seven weeks prior to the construction date, was a request for waiver of the construction period if its modification request could not be granted prior to the one year deadline. The Bureau further noted that, even if there were no waiver request, the circumstances of this case warrant waiver on the Bureau's own motion, pursuant to Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, of the one year construction period specified in Section 90.631(e) of the Rules.

III. THE DIRICO PETITION

7. In his petition, DiRico asserts that extension of the construction period in this instance is contrary to Commission policy and precedent. In support of this proposition, DiRico cites several cases, including *AAT Electronics Corporation*, 93 FCC 2d 1034 (1983), and *P & R Temmer*, 93 FCC 2d 1051 (1983), *both aff'd sub nom. P & R Temmer (Temmer)*, 743 F.2d 918 (D.C. Cir. 1984) and *Business Radio Communications, Inc. (Business Radio)*, 102 FCC 2d 714, in which the Commission held that the consequences of independent business decisions, such as a selection of a transmitter location, did not relieve a li-

censee of its responsibility to satisfy the five year loading requirements of the Commission's Rules. In addition, DiRico relies on *Associated Information Services (AIS)*, 3 FCC Rcd 5617 (1988), *recon. denied* 4 FCC Rcd 5082, (1989) where the Commission denied a request for waiver and extension of the one year Multiple Address System construction period contained in Section 94.51(a) of the Rules, 47 C.F.R. § 94.51(a).

8. Finally, DiRico contends that an extension of the one year construction period is inconsistent with the Commission's *Public Notice (Notice)*, No. 0160, released October 14, 1986. This *Notice* urged transmitter modification applicants to file modification requests and requests for Special Temporary Authority (STA) at least 10 days before the expiration of the construction deadline to provide the Commission with an ample period of time to process the STA request so as to permit the licensee to construct and operate the station and avoid license cancellation.

IV. DISCUSSION

9. DiRico's contention that the Bureau's waiver and extension of New England's construction period is inconsistent with precedent and policy is unconvincing. While the Commission, in *Temmer* and *Business Radio* held that the consequences of business decisions, such as those arising from a licensee's selection of equipment or transmitter location, ordinarily do not provide a basis for waiver of the loading deadline, which is generally five years, the present case concerns the considerably shorter one year construction period contained in Section 90.631(e).[3] In such instances, the Commission has favorably considered extension requests upon a showing of good cause when such requests are timely filed prior to the expiration of the construction period. *See, e.g.*, letter from Carol Fox Foelak, Acting Chief, Compliance Branch, Land Mobile and Microwave Division, to Carl B. Davidison (August 4, 1989).

10. DiRico's reliance on the Commission's decision in *AIS*, *supra*, in support of his petition is similarly misplaced. In *AIS*, although the Commission denied requests for extension of Multiple Address System construction deadlines that were filed for stations whose one year period had expired, the Commission granted extensions for stations where the extension requests were filed prior to the expiration of the one year construction deadline provided in Section 94.51(a) of the Rules.[4] *See AIS*, 3 FCC Rcd at 5619.

11. We are also unpersuaded by DiRico's assertion that our waiver and extension in the instant matter is contrary to the Commission's October 1986 *Notice*. The *Notice* was intended to discourage last minute transmitter modification requests filed for the purpose of tolling and, thus, circumventing the one year construction date. In this regard, the *Notice* expressly applied to licensees, unlike New England, that sought modification "just prior to" or "only a few days before" the end of the construction period. *Notice* at 2. This public notice is not applicable in the instant case as New England advised the Commission that it could not satisfy the one year construction date without modification of its authorized transmitter site seven weeks prior to the expiration of the deadline.

V. CONCLUSION

12. In summary, New England could not construct at its modified site in Cumberland, Rhode Island, within one year absent a waiver of the Commission's short spacing requirements. New England requested this requisite waiver well in advance of the construction deadline. As an STA is not generally granted when a rule waiver is required, particularly in the instant case where short spacing increases the potential for harmful interference, an STA enabling New England to construct and operate prior to the expiration of the one year construction period was unavailable because of New England's need for a waiver of the co-channel spacing provisions of Section 90.621(b). The Bureau granted New England's waiver request after the construction deadline. The waiver would have been meaningless without an extension of the construction deadline. Cancelling New England's license on the basis of failing to meet the original construction deadline would be arbitrary and capricious. Under these circumstances, we conclude that a waiver and extension of the construction provisions of Section 90.631(e) was proper as New England had no other alternative methods of satisfying the Commission's Rules. *See* Sections 1.3 and 90.151 of the Commission's Rules, 47 C.F.R. §§ 1.3 and 90.151; *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969); *Thomas Radio Co. v. FCC*, 716 F.2d 921 (D.C. Cir. 1983).

13. Accordingly, IT IS ORDERED that DiRico's request for reconsideration is denied.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] The opposition and reply primarily relate to the issue of whether WNIX 479 was constructed at New England's proposed relocation site in Cumberland, Rhode Island, within one year of the initial September 17, 1987, license grant. Resolution of this issue is not determinative because we have granted New England a waiver and extension of the one year construction deadline in Section 90.631(e) of the Rules. We have, however, concluded that the information submitted by New England concerning its station construction at the Cumberland location is credible. *See* paras. 5-6 *infra*.

[2] There is nothing extraordinary about this chronology of events as New England could not be expected to make final payment and take permanent delivery of station equipment for construction at a site that required a waiver of the Commission's Rules that had not yet been granted.

[3] Section 90.631(b) of the Commission's Rules specifies a five year loading deadline. *Business Radio* cited by DiRico involved a five year loading deadline. *See* 102 FCC 2d at 715. The issue involved in *Temmer*, however, concerned provisions of the Commission's Rules regarding staged construction that are no longer in effect. Staged construction allowed the SMR licensees in *Temmer* to extend the construction period for their full 20 channel facilities to five years if they constructed their initial five channel stage within one year and assumed the obligation of loading these five channels within two years rather than the

normal five year loading period. Thus, staged construction permitted these licensees to defer the implementation costs for their 20 channel systems if they demonstrated that all 20 channels would ultimately be placed in operation by loading their systems' initial five channel stages within two years. As the licensees in *Temmer* failed to load timely their initial five channel stages, the Commission denied their requests for extensions of the two year staged loading deadline and recovered 15 channels from each 20 channel station.

[4] Section 94.51(a) of the Rules provides, in pertinent part, that the license for an MAS system that is not placed in operation within one year of the initial license grant cancels automatically. This rule section specifies that requests for extension of time to construct and place such stations in operation must be submitted no later than 30 days prior to the expiration of this one year deadline. Although the provisions in Section 90.631(e) of the Rules that govern construction of SMR stations in the instant case do not specify the time period for requesting extensions, New England's notification that it could not construct at its authorized site and its request for transmitter relocation, filed seven weeks prior to the expiration of the construction date, was submitted in a timely manner.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO. — File No. I-T-D-90-005

Application for authority to deactivate and retire the United States - Bermuda Cable.

ORDER AND AUTHORIZATION

Adopted: March 22, 1990; Released: March 29, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on January 12, 1990 by American Telephone and Telegraph Co. (AT&T), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to deactivate and retire the United States - Bermuda cable. The application was placed on public notice on January 24, 1990. No comments were received.

2. The U.S.-Bermuda cable was placed in service on January 8, 1962, with an initial capacity of 80 voice-grade circuits. The Commission's Order and Certificate released on August 4, 1960 (File No. P-C-4612) authorized the construction and operation of the cable, and the cable landing license was issued on July 27, 1960 (File No. S-C-L-18). The capacity was increased to 82 voice circuits in 1967 (File No. P-C-4612-2). The cable is a single armorless cable composed of pre-transistor, vacuum tube vintage equipment for which off-the-shelf replacement parts are not readily obtainable. On July 2, 1989, the U.S.-Bermuda cable failed and AT&T has determined that repair is not economically favorable. Cable and Wireless (West Indies), the co-owner of the cable with AT&T, has agreed that retirement was desirable after nearly 28 years of service. All of the circuits were transferred to alternate facilities when the cable failed. AT&T states that it has ample alternative facilities to provide the services which were routed via the U.S.-Bermuda cable. AT&T further states that none of the IRU holders has expressed any objection or concern with respect to the retirement of the system.

3. Upon review, we find that the U.S.-Bermuda cable has reached the end of its useful service life and that substitute facilities are available via the PTAT-1 cable and the INTELSAT satellite system. Under these circumstances, we conclude that the permanent discontinuance of the U.S.-Bermuda cable and the transfer of service to alternate facilities can be accomplished with no discontinuance, reduction or impairment of service to a community or part of a community now served by the U.S.-Bermuda cable.

4. In view of the foregoing, IT IS HEREBY CERTIFIED that neither the present nor future public convenience and necessity will be adversely affected by the deactivation and retirement of the U.S.-Bermuda cable. Accordingly, IT IS ORDERED that application File No. I-T-D-90-005 IS GRANTED, and AT&T is authorized to discontinue operation of and retire the U.S.-Bermuda cable.

5. Within 60 days after the release of this order, the applicant shall notify the Commission of the accounting treatment they intend to use in retiring the U.S.-Bermuda Cable.

6. Upon discontinuance of use and operation of the U.S.-Bermuda cable, the applicant shall notify the Commission thereof and submit to the Commission for cancellation any submarine cable landing license it possesses covering the U.S.-Bermuda cable.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

VISIONAIRE, INC. File No. 15600-CM-P-83

For Authority to Construct and Operate
a Multichannel Multipoint Distribution
Service station on the E-group channels
at Yuba City, California

ORDER ON RECONSIDERATION

Adopted: January 29, 1990; Released: March 29, 1990

By the Chief, Common Carrier Bureau:

1. This matter concerns a petition for reconsideration of the dismissal by the Domestic Facilities Division (the Division) of the application of VisionAire, Inc. to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels at Yuba City, California and for reinstatement of the application.

I. BACKGROUND AND CONTENTIONS

2. As the result of a lottery held on March 27, 1987, VisionAire's application was selected for qualification review. Subsequently, the Division's staff conducted such a qualification review of this application pursuant to Section 21.32 of the Commission's Rules, 47 C.F.R. § 21.32. Upon examination, this application was found to contain several deficiencies that precluded the staff from making a finding that VisionAire was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of the application would serve the public interest. By letter dated May 1, 1987, VisionAire was notified of these deficiencies[1] and provided an opportunity to cure them within thirty (30) days of the date of the letter. In this deficiency letter, VisionAire was also advised that failure to file the requested information within thirty days of May 1, 1987 could result in the dismissal of its application.

3. By letters dated May 29, and June 12, 1987, VisionAire requested two thirty-day extensions of time to provide the requested information. By letter dated July 14, 1987, VisionAire stated that its financial qualifications had not changed materially since April 30, 1983, and provided a non-affiliation statement.[2] VisionAire did not submit the signed lease or option agreement,[3] FAA study,[4] or the interference analysis.[5]

4. Pursuant to Sections 21.13(c), 21.20(d), and 21.28(d) of the Commission's Rules, 47 C.F.R. §§ 21.13(c), 21.20(d), and 21.28(d), and by letter dated July 10, 1989, the Division dismissed, without prejudice, VisionAire's application for failure to comply in a timely manner with the Division's request for information.

5. On August 1, 1989, VisionAire submitted a petition for reconsideration of the Division's dismissal action. VisionAire maintained that reinstatement of the application would be in the public interest because: (1) in its letter of July 14, 1987, VisionAire had stated that transmitter space was available as of that date; (2) with its petition for reconsideration, VisionAire submitted a copy of an option to lease transmitter space, on the condition that space would be "available at the time of the execution of the formal lease"; (3) by its interpretation, it was not required by Section 21.15(a) to provide a lease or option agreement, and thus, that a statement by its attorney of site availability was sufficient; and (4) it had received correspondence from California State University at Chico listing the location of its ITFS receiver sites.[6] VisionAire's Petition was silent on the subject of its failure to submit the required FAA study. It also argued that reinstatement would "expedite the provision of service by avoiding the necessity of relotterying these facilities and the attendant delay therewith." VisionAire's Petition for Reconsideration at 2.

II. DISCUSSION

6. As of the date of the Division's dismissal action, July 10, 1989, and two years after the Division's request for information, VisionAire still had not submitted the information necessary for our evaluation of its qualifications to be an MMDS licensee. For example, VisionAire had not submitted a lease, lease option agreement, or other "concrete evidence" to demonstrate the availability of its proposed transmitter site as required by Section 21.15(a), 47 C.F.R. § 21.15(a).[7] For MMDS applications subject to the Commission's lottery proceedings, a demonstration of reasonable assurance of site availability, as VisionAire submitted here, is sufficient prior to lottery. However, once the lottery is held, a fully-executed lease, option agreement or other concrete evidence of site availability must be submitted. *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987) (Where there is a lottery "it shall be sufficient if the application adequately demonstrates reasonable assurance of the availability of the site. A license will not be granted, however, until concrete evidence of site availability is submitted."). Thus, VisionAire's reasonable assurance statements were inadequate post-lottery as "concrete evidence" of the availability of its proposed transmitter site.

7. In addition, VisionAire failed to comply with the request to submit a Section 21.902(i) non-interference analysis. Section 21.902(i) requires MMDS applicants to submit, prior to receiving a construction authorization and at such time as the Commission requests, an analysis demonstrating that the proposed MMDS facilities will not cause harmful interference to existing co-channel or adjacent channel Instructional Television Fixed Service (ITFS) receiver locations within 50 miles of the MMDS transmitter, or alternatively, an "interference-acceptance" statement from the affected ITFS licensee. By the express language of this rule, an MMDS applicant must submit a non-interference analysis at such time as the Commission requests it. Despite the specific request for this analysis in the 1987 deficiency letter, VisionAire failed to submit the required analysis. *See Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988).

8. VisionAire had a duty to submit curative amendments to its application within thirty days of May 1, 1987, or to seek an extension of time. Its failure to submit curative amendments for almost two years substantially impeded the expeditious offering of MMDS at Yuba City. Also, VisionAire's failure to respond in a timely fashion to the Division's information requests hindered the discharge of the Commission's statutorily-imposed duties under Title III of the Communications Act. As the Commission stated in *By Direction of the Commission Letter to US West*, 60 Rad. Reg. 2d 8, 9 (1985), with regard to the failure timely to submit the complete US West/MCI antitrust litigation settlement agreement:

> The Communications Act manifests a congressional view that the FCC must have full access to relevant information . . . . The statutory plan is not for carriers to determine what information is to be furnished and when. It is for this Commission to do so. The FCC is a relatively small, overburdened agency. If it does not receive full cooperation from its regulatees when it needs relevant information, it cannot discharge its statutory responsibilities.

Because we lack the Section 21.902(i) interference analysis and the required FAA study, we are still not in a position to complete our evaluation of VisionAire's MMDS station proposal and its qualifications to be an MMDS licensee. In view of the foregoing, we conclude that dismissal of this application for failure to comply with the Division's requests for information was proper, reconsideration of that action is not warranted, and reinstatement of the application is not justified.

III. ORDERING CLAUSE

9. Accordingly, IT IS ORDERED that the petition for reconsideration and reinstatement filed by VisionAire, Inc. regarding its Yuba City MMDS application IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] The deficiencies cited were the absence of: (1) a lease or lease option agreement, pursuant to 47 C.F.R. § 21.15(a); (2) FAA study, pursuant to 47 C.F.R. § 21.15(d); (3) current financial data, pursuant to 47 C.F.R. § 21.17(b); (4) a non-affiliation statement, pursuant to 47 C.F.R. § 21.900; and (5) a 47 C.F.R. § 21.902(i) non-interference analysis.

[2] At that time, Section 21.900 of the Commission's Rules, 47 C.F.R. § 21.900, required MMDS applicants to submit a statement indicating whether there is an affiliation or relationship to any intended or likely subscriber or program originator.

[3] VisionAire stated that it intended to choose a final transmitter site at an unspecified future date.

[4] VisionAire stated that it was in the process of deciding whether FAA notification was required.

[5] VisionAire merely provided the names of affected Instructional Television Fixed Service permittees and applicants.

[6] VisionAire has never indicated that any interference analysis has commenced.

[7] Section 21.15(a) provides *inter alia*: "Applicants proposing a new station location . . . shall indicate whether the station site is owned. If it is not owned, its availability for the proposed radio station site shall be demonstrated. Under ordinary circumstances this requirement will be considered satisfied if the site is under lease or under written option to buy or lease. . . . " VisionAire presents no argument as to why it should be exempted from "ordinary circumstances" treatment, which would require by the terms of this rule provision that a lease or written option to buy or lease be submitted. In addition, even if VisionAire was not required to comply with the requirements of Section 21.15(a), VisionAire was required pursuant to Section 21.13(c) to submit a lease or option agreement after Division staff stated in the May 1, 1987 letter that a lease or option agreement was required for qualification review purposes and requested VisionAire to submit it. Section 21.13(c) provides *inter alia*: "In addition to the general application requirements of §§ 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact: . . . (2) As the Commission, at any time after the filing of an application . . . may require from any applicant . . . to enable it to determine whether a radio authorization should be granted . . . ."

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS
CORPORATION,
Complainant,

v. File No. E-87-41 and
File No. E-89-35

SOUTHERN BELL TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: March 21, 1990; Released: March 29, 1990

By the Commission:

1. MCI Telecommunications Corporation ("MCI") has filed a petition for reconsideration of the Commission's order dismissing the above-captioned complaints against Southern Bell Telephone and Telegraph Company ("Southern Bell"). 4 FCC Rcd 8135 (1989). Southern Bell opposed the petition, and MCI replied.

2. In its complaints, MCI requested that the Commission find that Southern Bell's earned rate of return for interstate switched access services in Florida for 1987 was unlawfully high. MCI sought an award of damages for overearnings from April 1, 1987, through December 31, 1987. MCI argues that the Commission erred in holding that MCI had "provided *no reason* why [the Commission] should deviate from examining rates in relation to the two year monitoring period." *Id.* at 8136 (emphasis supplied). MCI claims that it provided several compelling reasons why the Commission should determine the lawfulness of Southern Bell's rates based on a one year review period.

3. MCI reiterates several reasons why the earned rate of return may properly be calculated based on a one year period. First, it maintains that judging the lawfulness of rates on an annual basis "is consistent with general regulatory law and Commission policy and practice." Petition at 5. Moreover, according to MCI, under traditional rate base regulation, the normal test period is one year. Indeed, it points out, the Federal Energy Regulatory Commission (FERC) and most states use one year as the basis on which to test the legality of rates. Additionally, MCI argues that using a "one year period helps insure that the cost causative customer is charged with the costs of serving him," (*id.* at 7) and it claims that without a one year review period overearnings may be hidden by rising future costs in times of inflation, allowing carriers to keep funds collected under rates that are higher than would have been permissible when the funds were collected. Finally, MCI asserts that "the use of a maximum review period of one year serves the interests of purchasers of access services and their customers." *Id.* at 8. It explains that since interexchange carriers purchase access and provide service competitively, it is essential that access be offered at fair and reasonable prices. MCI concludes that the use of a one year period "aids interexchange carriers that do not have the 'deep pockets' that otherwise would be needed to compete." *Id.*

4. Although MCI has presented several general arguments why the Commission might have chosen to adopt a one year review period in CC Docket No. 84-800,[1] instead of the two year review period selected, it provides no basis for deviating from this policy in this specific instance. The issue in this complaint proceeding is not whether a one year period could be used by the Commission as the review period for enforcing the prescribed maximum allowable rate of return for Southern Bell, but whether sufficient justification has been provided to support deviation from existing Commission policy for purposes of this specific adjudication. MCI has presented no such basis. Therefore, we deny the petition for reconsideration.[2]

5. Accordingly, IT IS ORDERED, that the petition for reconsideration filed by MCI Telecommunications Corporation on December 18, 1989, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, Phase I, FCC 85-527, 50 Fed. Reg. 41350 (Oct. 10, 1985)(*Phase I Order), recon.*, FCC 86-114 (released Mar. 24, 1986), *summarized in* 51 Fed. Reg. 11033 (Apr. 1, 1986). We recently reaffirmed that the monitoring period adopted in CC Docket No. 84-800 is appropriately applied as the review period in the context of Section 208 proceedings. AT&T v. Northwestern Bell Telephone Co., 5 FCC Rcd 143 (1990); MCI Telecommunications Corp. v. Pacific Northwest Bell Telephone Co., *et al.*, 5 FCC Rcd 216 (1990).

[2] Our order dismissed MCI's complaints without prejudice. It is free therefore to file new complaints at any time within the statute of limitations period.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Paul Kelley d/b/a
AMERICAN TELTRONIX
Licensee of
Station WNHM552

SECOND MEMORANDUM OPINION AND ORDER

Adopted: March 21, 1990; Released: March 29, 1990

By the Commission:

I. INTRODUCTION

1. On October 7, 1988, Mobilfone of Northeastern Pennsylvania, Inc., (Mobilfone) filed a Petition for Reconsideration (Petition) of our *Memorandum Opinion and Order*[1] (*MO & O*), that found American Teltronix (AMTEL), a private carrier, not subject to state entry and rate regulation. Oppositions to the Petition were filed by the National Association of Business and Educational Radio, Inc. (NABER) on October 20, 1988 (NABER Opposition), and AMTEL on October 26, 1988 (AMTEL Opposition). Mobilfone filed a Consolidated Reply (Reply) to the Oppositions on November 9, 1988. We find that Mobilfone's Petition does not provide a sufficient basis for reconsideration. We therefore deny Mobilfone's Petition and affirm our *MO & O*.

II. BACKGROUND

2. This controversy began in January 1987 when Mobilfone brought an action before the Pennsylvania Public Utility Commission (PUC) alleging that AMTEL was operating as an uncertificated common carrier. As a result of this complaint, on September 29, 1987, AMTEL filed a Request for Declaratory Ruling that asked the Bureau to find that its private carrier paging system is providing a private land mobile service and is, therefore, not subject to state entry and rate regulation, pursuant to Section 332(c) of the Communications Act, 47 U.S.C. § 332(c). In response to this request, the Private Radio Bureau issued a *Declaratory Ruling* (*Ruling*)[2] in March 1988 finding that AMTEL is licensed as and operating a private land mobile system within the meaning of Sections 3(gg) and 332(c)(1) of the Communications Act, 47 U.S.C. §§ 153(gg), 332(c)(1). Thus, pursuant to Section 332(c)(3) of the Communications Act, 47 U.S.C. § 332(c)(3), the Bureau concluded that AMTEL was not subject to state rate and entry regulation.[3] The Bureau also concluded that even though AMTEL may have served ineligible users, this fact, even if true, would not make its system a common carrier but, rather, would indicate that AMTEL may have violated the terms of its private land mobile license - a Commission, not state, enforcement matter.[4]

3. In April 1988, Mobilfone sought reconsideration of the Bureau's *Ruling*. Following pleadings in opposition filed by AMTEL and NABER, Mobilfone filed a Consolidated Reply in May 1988 asking, in part, that we withhold further action in this proceeding until we could review new testimony just given to the Pennsylvania PUC that, it alleged, demonstrated AMTEL's for-profit resale of telephone service. In July 1988, Mobilfone filed a Supplement to its Consolidated Reply and a Motion for Leave to File Supplement. The Supplement consisted mainly of excerpts from transcripts of hearings before the Pennsylvania PUC that disclosed, according to Mobilfone, that AMTEL was engaged in for-profit resale of telephone service and service to ineligibles. This fact, Mobilfone contended, changed AMTEL from a private land mobile licensee into a common carrier.

4. By *Memorandum Opinion and Order* released in September 1988, we affirmed the Private Radio Bureau's *Ruling*.[5] Based on a full review of the record, we found that AMTEL was operating a private land mobile radio system under the test for distinguishing between private land mobile and common carrier services in Section 332(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 332(c).[6] Thus, the state regulatory agencies could not exercise jurisdiction over AMTEL.[7] We specifically addressed Mobilfone's contention regarding service to ineligibles and concluded that service to ineligibles, either intentional or inadvertent, would not subject a private land mobile licensee to state regulatory authority for operating as an uncertificated common carrier.[8] Finally, we rejected as untimely and not dispositive of the issues in this proceeding the supplemental information provided by Mobilfone in July 1988.[9]

III. PETITION FOR RECONSIDERATION

5. Mobilfone now seeks reconsideration of our *Memorandum Opinion and Order* on the grounds that we erred in refusing to consider its supplemental pleading. It maintains that this pleading contained newly obtained and decisionally relevant information about AMTEL's resale of telephone services or facilities of a common carrier and that our failure to consider this new information resulted in an erroneous decision.[10] Mobilfone continues that there is now an additional reason why reconsideration is warranted. Petitioner asserts, in this regard, that a further event relating to AMTEL's service to ineligible users has occurred since its last opportunity to present evidence in this proceeding. According to Mobilfone, after our decision in the *MO & O*, AMTEL sought and obtained the paging business of the Carbon-Monroe-Pike Mental Health Mental Retardation Program, allegedly a local government entity not eligible under Section 90.75(a) of the Commission's Rules, 47 C.F.R. § 90.75(a), to receive service from AMTEL.[11]

6. Both AMTEL and NABER note in their oppositions to the petition for reconsideration that although the Commission rejected as untimely Mobilfone's supplemental pleading, the information contained in the Supplement was reviewed and found not to be dispositive of the issues in this proceeding.[12] Consequently, opponents contend this argument does not warrant the Commission's reconsideration of the *MO & O*. Nor, for that matter, AMTEL asserts, does its providing paging services to the Carbon-Monroe-Pike Mental Health Mental Retardation Program (CMP Program) merit reconsideration. AMTEL submits

that not only did it in good faith determine that the CMP Program was eligible under the clinic category of § 90.75(a)(4), 47 C.F.R. § 90.75(a)(4), but even if it were not considered eligible, the Commission has already decided that serving ineligible users does not transform a private radio provider into a common carrier.[13]

7. In reply to the oppositions, Mobilfone argues that the Commission's cursory statement fails to give any inkling as to the basis for its stark determination that the Supplement is not dispositive. Mobilfone therefore concludes that reconsideration should be granted to ensure that the potentially decisionally significant matters addressed in the Supplement are considered.[14] Further, Mobilfone contends that no authority has been cited for the hypothesis that a governmental entity performing an allegedly "private" function may elect, at its option, to utilize frequencies that are otherwise reserved for Business Radio Service eligibles, and that spectrum is reserved for local government under Section 90.17 of the Rules, 47 C.F.R. § 90.17.[15]

IV. DISCUSSION

8. *Statutory provisions.* Congress enacted the Communications Amendments Act of 1982,[16] which established Sections 3(gg) and 332(c), 47 U.S.C. §§ 153(gg) and 332(c), to define clearly a private land mobile service and to establish the scope of federal, state, and local regulation of the land mobile services.[17] Pursuant to Section 332(c)(3) of the Communications Act, 47 U.S.C. § 332(c)(3), state entry and rate regulation of a communications service offered by a private land mobile radio system is preempted by statute.[18] The accompanying legislative history reveals that Congress recognized the Commission's broad discretion to dictate which land mobile systems are to be regulated as private. Section 332(c)(1) of the Communications Act, 47 U.S.C. § 332(c)(1), constitutes a narrow limitation on this otherwise broad discretion by defining circumstances under which a land mobile system cannot be regulated as a private service.[19]

9. The test for determining whether the preemption provisions of Section 332 apply to a given communication system, as set forth in Section 332(c)(1) of the Communications Act, 47 U.S.C. § 332(c)(1), and its legislative history, turns on whether the system is engaged in resale of telephone services or facilities of a common carrier.[20] Application of this statutory test first requires an inquiry into whether the private system is licensed to multiple licensees or shared by authorized users and, if so, whether the system is interconnected with the public switched telephone network. Only if both of these conditions are met will a further assessment be made of whether the entity providing the interconnection is reselling for profit telephone exchange or interexchange service or facilities.[21] Where the interconnection restriction does not apply, it remains within the Commission's discretion to designate as private a particular land mobile system. Nothing in Section 332(c)(1), 47 U.S.C. § 332(c)(1), dictates that the private nature of a land mobile service is affected by offering that service indiscriminately to eligible users on a commercial basis.

10. The Court of Appeals upheld the Commission's interpretation of Section 332(c)(1), 47 U.S.C. § 332(c)(1), in *Telocator Network of America v. FCC (Millicom).* [22] This case concerned a nationwide paging system licensed to a single entity proposing to serve users on a private carrier basis. Observing that the paging system was individually licensed and under the exclusive control of the licensee, the Court concluded that "the interconnection restriction applies only to shared systems where the land station is controlled directly by the authorized users and not to every shared system merely because the end-users have access to the system through the licensee."[23] Thus, in cases where a system is individually licensed, and where the licensee alone has the ability to access and control the system transmitters, the interconnection test of Section 332 is inapplicable and, therefore, the issue of for-profit resale need not be reached.[24]

11. Another issue raised by petitioner in this proceeding is whether a system qualifies as a private land mobile service within the meaning of Section 3(gg) of the Communications Act, 47 U.S.C. § 153(gg), if it happens to serve entities not eligible in the business radio service.[25] Section 3(gg) cannot be regarded as a further test of whether a land mobile system remains private, but instead, was intended by Congress to recognize this Commission's long-standing policy that eligibility is a factor we consider as part of our licensing process in the private land mobile services, and that private land mobile licensees may only serve eligibles.[26] Service to ineligible users does not transform a private land mobile service into a common carrier subject to state regulation. Serving ineligibles, however, will give rise to sanctions for failure to comply with the Commission's rules. Section 90.415(b) of our Rules, 47 C.F.R. § 90.415(b), simply does not permit common carriage on private land mobile frequencies. If the practice were to occur, it would have to be terminated. We would not, however, change our regulatory structure and begin regulating the licensee as a common carrier.[27]

12. *Resolution of Issues on Reconsideration.* We now consider the specific allegations in the *Petition.* First, we conclude that Mobilfone's July 1988 Supplement was correctly rejected as untimely. The information Mobilfone sought to submit, which consisted mainly of excerpts from transcripts of hearings conducted by the Pennsylvania Public Utility Commission on October 20, 1987 and April 25, 1988, was previously available, and Mobilfone has not shown why it could not have been submitted earlier in the proceedings.[28] In any event, the Supplement, in fact, was reviewed and a determination made that the information it contained was not dispositive of the issues before us.[29] Thus, even if there had been an error in rejecting the Supplement, it would have been harmless error. Therefore, this matter provides no genuine basis for granting the reconsideration request.

13. Second, nothing new has been offered by Mobilfone which would indicate that we erred in finding that AMTEL is operating a private land mobile radio service within the meaning of the relevant statutory provisions.[30] Mobilfone's assertion that AMTEL may be serving ineligible users, even if true, does not compel the conclusion that its system falls outside the statutory definition of Section 332(c)(1) of the Communications Act, 47 U.S.C. § 332(c)(1). Although such activity may lead to an enforcement action by this Commission, as the Bureau previously stated, "the fact that AMTEL may have served ineligible users does not render its system common carriage, but merely indicates that AMTEL may have violated the terms of its license."[31] As correctly observed by AMTEL, "if it turns out that the Mental Health Program does not qualify as an eligible user, that fact does not

submit AMTEL to the jurisdiction of the Pennsylvania PUC or to common carrier regulation in general."[32] Mobilfone's new evidence, consequently, does not raise an issue that requires reconsideration.[33]

V. CONCLUSION

14. Accordingly, pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, IT IS ORDERED that the Petition for Reconsideration filed by Mobilfone of Northeastern Pennsylvania IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Paul Kelley d/b/a American Teltronix Licensee of Station WNHM552, *Memorandum Opinion and Order*, 3 FCC Rcd 5347 (1988).

[2] Paul Kelley d/b/a/ American Teltronix, 3 FCC Rcd 1091 (1988).

[3] *Id.* at para. 11.

[4] *Id.* at para. 13.

[5] *MO & O*, note 1 *supra*.

[6] *Id.* at para. 6.

[7] *Id.* at para. 8.

[8] As we stated in the *MO & O*, service to ineligibles could, however, give rise to an enforcement action under the Commission's Rules. If sanctions were warranted, they would take the form of a notice of violation, forfeiture or license revocation, not reclassification of AMTEL as a common carrier. *Id.* at paras. 7 & 9.

[9] *Id.* at para. 1, n. 2.

[10] Petition for Reconsideration at 4-5.

[11] *Id.* at 6-7.

[12] AMTEL Opposition at 1-2 and NABER Opposition at 2-3.

[13] AMTEL's Opposition at 1-2 and NABER's Opposition at 3-4. NABER also submits that the affidavit of Nicholas J. Begovich, President of Pocono Mobile Radio Telephone Co., Inc., which is attached to Mobilfone's Supplement, is hearsay and can only show that the company no longer serves the CMP Program. In any event, NABER argues, the affidavit is totally irrelevant to this proceeding. Service by AMTEL to ineligible users does not result in a reclassification of AMTEL as a common carrier. We note that pursuant to 47 C.F.R. § 1.351, we may consider hearsay as probative evidence if it would serve the interests of justice.

[14] Mobilfone's Reply at 2.

[15] *Id.* at 2.

[16] P.L. 97-259, 96 Stat. 1087 (September 13, 1982); *See* Conference Report No. 765, 97th Cong., 2d Sess. 54, *reprinted in* 1982 U.S. Code Cong. and Ad. News 2237 (Conference Report). (Hereinafter, all citations to the Conference Report will reference pages of the original printing.)

[17] Conference Report at 54.

[18] Section 332(c)(3) of the Communications Act, 47 U.S.C. § 332(c)(3), provides that "no state or local government shall have any authority to impose any rate or entry regulation upon any private land mobile radio service."

[19] Conference Report at 54-55.

[20] *Id.* at 55.

[21] *Id.*

[22] 761 F.2d 763 (D. C. Cir. 1985).

[23] *Millicom*, 761 F.2d at 767.

[24] Section 90.179 of the Commission's Rules states that "[a] station is shared when persons not licensed for the station control the station for their own purposes pursuant to the licensee's authorization." 47 C.F.R. § 90.179. AMTEL operates a store-forward paging system. Users call into AMTEL's terminal and their messages are recorded. These messages are stored and then sent to the proper recipients in order of receipt to the terminal. *See* Paul Kelley d/b/a/ American Teltronix, 3 FCC Rcd 1091, para. 4, (1988). Users, therefore, cannot directly activate the transmitter and therefore do not control the system. Consequently, AMTEL does not operate a shared station.

[25] Pursuant to Section 3(gg) of the Communications Act, 47 U.S.C. § 153(gg), a private land mobile system consists of a "regularly interacting group of base, mobile, portable, and associated control and relay stations . . . for private . . . land mobile communications by eligible users . . . ."

[26] Conference Report at 54.

[27] *MO & O* at para. 7. *See also*, General Telephone of the Southwest, Memorandum Opinion and Order, FCC 90-75 (adopted February 15, 1990 at para. 10.)

[28] *See* 47 C.F.R. § 1.106(c).

[29] In its Supplement, Mobilfone argued that AMTEL had transformed its radio service to common carriage because it had engaged in the resale for profit of telephone services or facilities of a common carrier by allegedly charging an extra fee for providing an additional telephone number. Because AMTEL does not operate a multiple licensed or shared system, however, the question of whether there has been a resale for profit is not relevant to a determination that its system is a private land mobile service and, therefore, need not be reached. Furthermore, as a matter of interest we note that such an additional charge does not evidence a for-profit resale of common carrier services and facilities, but merely indicates the different end user equipment and paging signalling formats available to AMTEL's customers. Such enhanced paging services are common-place features of many private carrier paging systems.

[30] An administrative law judge for the Pennsylvania Public Utility Commission ruled that the state did not have jurisdiction to impose entry or rate regulation on AMTEL, as AMTEL is licensed by this Commission as a private land mobile service and is, therefore, pursuant to Section 332(c) of the Communications Act, 47 U.S.C. § 332(c), exempt from such state regulation. *See* Mobilfone, Inc. v. Paul Kelley, d/b/a American Teltronix, slip op. (Pennsylvania Public Utility Commission, January 1989) (initial decision). That decision was affirmed on July 20, 1989, by the Pennsylvania Public Utility Commission.

[31] *Ruling* at para. 13.

[32] AMTEL Opposition at 4.

[33] To determine conclusively whether AMTEL is operating in compliance with our Rules, on September 6, 1989, we requested from AMTEL information relating to the identity and eligibility of the customers receiving service during calendar years 1988 and 1989. AMTEL submitted its response on October 6, 1989. According to AMTEL's response, it appears that all customers presently served (including the Mental Health Program, which

is described as an "out-patient clinic") are Business Radio Service eligibles. Our rules specifically identify clinics as one class of Business Radio eligible. *See* 47 C.F.R. § 90.75(a)(4). Although it also appears that AMTEL has, in the past, served a small number of ineligibles, AMTEL promptly terminated service upon discovery of their ineligibility. Finally, AMTEL's response demonstrates that it diligently examines the basis for each customer's eligibility and has, in fact, turned away potential customers who have been deemed ineligible. As a result of our investigation, we find AMTEL in compliance with our Rules governing eligibility.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Prescription of
Revised Percentages of
Depreciation pursuant
to the Communications
Act of 1934, as amended for:

GTE Florida Incorporated
GTE North Incorporated
Michigan Bell Telephone Company
New York Telephone Company
Northwestern Bell Telephone Company
Southern Bell Telephone and Telegraph Company
Southwestern Bell Telephone Company
The Bell Telephone Company of Pennsylvania
The Chesapeake and Potomac Telephone Company
The Chesapeake and Potomac Telephone
Company of Maryland
United Intermountain Telephone Company
Wisconsin Bell, Inc;

and

The Elimination of the
Requirement for Maintaining
Vintage Reserves.

ERRATUM

Released: March 13, 1990

The *Order* released on January 31, 1990 (FCC 90-44) contained errors in the Appendix. The Appendix is corrected as follows:

1. The second footnote on page 1 is changed to read: "The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E ordered in FCC 88-7, released January 22, 1988, are continued."

2. The second footnote on page 9 is changed to read: "As described in paragraph 21 of the Order, the net service value for the Crossbar Adjunct Account is to be amortized over 45 months ending December 31, 1992."

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-474

In re Applications of

ADVANCED BROADCAST TECHNOLOGIES, INC. — File No. BPH-870915MC

Board of Trustees of the PENNSYLVANIA STATE UNIVERSITY — File No. BPED-87-916MD

For Construction Permit for a New FM Station on Channel 233A, State College, Pennsylvania

Appearances

Richard J. Bodorff, and *Jonathan W. Emord* on behalf of Advanced Broadcast Technologies, Inc. and *Neal J. Friedman*, on behalf of the Board of Trustees of the Pennsylvania State University.

DECISION

Adopted: March 13, 1990; Released: March 30, 1990

By the Review Board: BLUMENTHAL and ESBENSEN.

Board Member ESBENSEN:

1. Before the Review Board are (1) the *Initial Decision*, 4 FCC Rcd 6821 (1989)(I.D.) of Administrative Law Judge John M. Frysiak (ALJ); (2) the exceptions thereto filed by the Board of Trustees of the Pennsylvania State University (Penn State); and (3) the reply of Advanced Broadcast Technologies, Inc. (Advanced). Based upon our review of these documents and the record below, and having heard oral argument on February 9, 1990, we affirm the ALJ and grant the application of Advanced.

BACKGROUND

2. The *Hearing Designation Order*, 3 FCC Rcd 5892 (1988)(HDO), released in this proceeding originally designated four competing applicants for consolidated hearing. Two of the original applicants dismissed their applications pursuant to settlement agreements with Advanced. I.D., para. 1. Following favorable resolution of an "air hazard" issue specified with respect to Advanced, the proceeding was heard before the ALJ solely on the "standard comparative" issues, as guided by the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965)("*1965 Policy Statement*"). The ALJ determined Advanced to be the best qualified applicant to receive the construction permit based upon his award of a 100% full-time "integration of ownership into management" credit to Advanced (enhanced by its principal's past service area residence and proposed future residence, past broadcast experience, and auxiliary power provisions). Conversely, no corresponding "integration" credit, a factor of "substantial importance," *1965 Policy Statement* at 395, was awarded Penn State because no member of its Board of Trustees proposed to manage the facility. *See* Penn State Exh. 1. That applicant was also charged with a significant diversification demerit because Penn State is the licensee of "Class D" educational station WPSU(FM), State College,[1] as well as the licensee of non-commercial stations WPSX(TV), Clearfield, Pennsylvania (some 35 miles distant from State College), and WPSE(AM), Erie, Pennsylvania (approximately 150 miles distant).[2]

3. Penn State has not excepted to the more fundamental "integration" determinations of the ALJ with respect to its application or that of Advanced. In point of fact, on a comparative basis, Penn State has only excepted to the alleged failure of the ALJ to (1) add a "specialized programming" issue it had requested; (2) award Penn State a preference "equivalent to local residence" based upon "its long-standing intimate relationship with State College"; (3) award less than a "significant diversification demerit" with respect to its application; and (4) diminish his award of local residence and past broadcast experience enhancements to Advanced. Recognizing that these exceptions, even if granted, would not overcome the award of 100% ownership/management integration credit to Advanced, Penn State principally focuses its exceptions on the basic qualifications of Advanced.

PENN STATE EXCEPTIONS TO ADVANCED'S BASIC QUALIFICATIONS

4. *Advanced's Transmitter Site*: Penn State originally filed a petition to enlarge the issues in this proceeding on January 17, 1989, claiming that Advanced never had "reasonable assurance" of its originally-proposed transmitter site. The ALJ declined to add the issues by *Memorandum Opinion and Order*, FCC 89M-626, released February 24, 1989. In its exceptions, Penn State essentially resurrects its same argument, claiming that the facts and circumstances surrounding Advanced's "reasonable assurance" of its original transmitter site raise substantial and material questions of fact sufficient to require a remand of this proceeding. More specifically, Penn State asserts that Advanced falsely represented its "reasonable assurance" at the outset, and was thereafter "lacking in candor" as a result of claims made in subsequent pleadings (Penn State Exceptions at 5).

5. In seeking to enlarge the issues in the proceeding below, Penn State relied upon a declaration of Walter D. Barker, licensee of WZWW(FM), Bellefonte, Pennsylvania, which claimed as follows (Petition to Enlarge Issues, Exh. 2):

> I am the owner of the tower utilized by WZWW(FM), Bellefonte, Pennsylvania. During the summer of 1987 I received a call from someone identifying himself as Lynn Deppen of Advanced Broadcast Technologies, Inc. inquiring about the use of the WZWW tower for a new FM station in State College, Pennsylvania. I later received a written op-

tion from Mr. Deppen, but did not sign it. I next heard from Mr. Deppen by telephone in approximately September, 1987 either just before or just after Advanced filed its application for the new station in State College. I told Mr Deppen at that time that I was not willing to allow him the use of my site.

I later received a letter dated November 23, 1987 in which Mr. Deppen again asked for permission to use the site and included two copies of an option agreement. I typed a brief note on the bottom of Mr. Deppen's letter setting forth terms that I hoped would be sufficiently unreasonable that he would no longer bother me about use of the site. My recollection is that total cost would have been about $1500 for an option on the site. I further advised Mr. Deppen that I had not given him formal authorization to use my site and warned him that I was prepared to instruct my attorney to file an opposition to Advanced's application. Following that I received several more telephone calls from Advanced's attorneys requesting permission to use my site. In the most recent conversation, several weeks ago, I told the attorney for Advanced that Penn State was the only applicant to whom I had given permission to use the site and would not provide reasonable assurance to any other party. Penn State continues to be the only applicant for a new FM station in State College to whom I have provided permission to use the WZWW tower. I have no intention of providing permission to any other applicant.

6. Advanced's version of the events is that, on July 27, 1987, nearly two months prior to the time that it filed its application, its principal, Lynn A. Deppen, and an associate, Victor A. Michael, Jr., travelled to State College, Pennsylvania for the express purpose of obtaining a transmitter/antenna site for Advanced's proposed facility. They contacted various realtors in the area, and a local land owner "steered them in the direction" of the licensee of WWZW(FM), Bellefonte, Pennsylvania (Barker) who had an existing tower utilized in the operation of his facility. *See* Advanced Opposition to Petition to Enlarge Issues, filed February 3, 1989, Att. C.

7. Before Deppen contacted Barker, Deppen and Michael apparently discussed between themselves what they thought a reasonable lease amount should be; Deppen then called Barker from a pay telephone. During this conversation, Deppen made contemporaneous hand-written notes. Barker, according to Deppen's notes, indicated that he had already leased tower space to Motorola and GTE, and that Barker specifically told Deppen "he is willing to do a lease [with] me." Barker also said "I should hurry up." *Id.*, at Att. F. Deppen claims that he further told Barker that, with his permission, "I would specify the site in my application to the FCC. He said 'sure,' and . . . that I should write a letter confirming our discussion." *Id.*, at Att. C.

8. According to Deppen, he and Barker also discussed during this initial telephone contact such considerations as (1) monthly rental for the site ("in the range of $300 to $500 a month"); (2) Deppen's proposed use of a two-bay transmitting antenna; (3) a 5/8" coaxial transmission line to feed the antenna; (4) power levels; (5) where to place the antenna on Barker's tower; (6) sharing of Barker's existing transmitter building; (7) installation of new electrical service for Deppen's operation; (8) installation of an "STL dish" (studio-to-transmitter link antenna); (9) locations of guy wires, as well as various other related matters. *Id.*

9. On July 30, 1987, Deppen sent Barker a letter confirming this telephone conversation. *Id.*, Att. G. However, Barker apparently did not reply. Thereafter, Deppen filed the Advanced application on September 27, 1987, and called Barker two days later. He again made contemporaneous notes of this follow-up conversation, *id.*, Att. I, and noted that the following was the substance of the conversation (*id.*, Att.C, at 5-6):

> Several days after filing, I spoke with Mr. Barker, again, this time on September 29, 1987. I called Mr. Barker at 10:45 AM. We talked about the fact that I would place my antenna on his tower at 174 feet above ground, that it would be a two-bay antenna, and that my transmitter power would be approximately .9 kilowatts with an effective radiated power of .813 kilowatts. I told him that I would use an inch and 5/8ths coaxial cable that would be about 200 feet in length. He agreed that this would be fine with him. He told me that he would send me a letter confirming that the space would be available to me to comply with the Commission's site availability compliance standards but this time said it would be at a $450 to $855 per month rental. Although the $855 per month figure appeared high to me, I knew it could still fit within my budget, so I accepted it. We talked about the application. He said that he had heard that Penn State [and two other applicants] had filed. He apologized for not sending me a letter, and he said that he would get a letter in the mail confirming our understanding. He made it clear that he understood from his own experience what site availability was and that I could rest assured that I had it. I said "wonderful."

10. However, after still not receiving Barker's promised letter by November 23, 1987, Deppen wrote Barker yet again, enclosing a proposed option agreement, and a check payable to Barker in the amount of $100.00 to secure the option. In response, Barker typed a note (dated November 30, 1987) at the bottom of Deppen's November 23 letter as follows (*id.*, at 9; emphases added):

> Mr. Deppen: Please note that I am going to instruct my attorney to file an opposition to your application for State College, Pa. You have not received *formal* permission to use my tower site for application purposes, or for *formal* construction. A *formal* option will cost you, as everyone else, $1500. Lease costs for an FM radio station is $550.00 per month, the first and last month in advance. A non-refundable option fee total for a lease at this tower site would be $2,500.00. I will give you one week to reply before I contact my attorney. Thank you, W.D. Barker.

11. Upon receiving Barker's note on December 10, 1987, Deppen was advised by counsel to notify the Commission of the apparent "loss" of Advanced's transmitter site. Advanced promptly filed such a notification on De-

cember 15, 1987, and on January 15, 1988 amended its application to specify a new transmitter site. Penn State did not oppose this amendment (which was filed some nine months before the HDO was released), and the Advanced amendment was granted by the Bureau in the HDO.

12. In opposition to Penn State's Motion to Enlarge Issues, in addition to Deppen's sworn statements, Advanced claimed that Penn State's Motion was untimely, because it did not oppose Advanced's amendment to a new site, and it waited some 16 months after Advanced filed its application specifying Barker's tower. Advanced also claims that Barker did not reveal that he was the licensee (more than just the "owner of the tower" of WZWW(FM)); and, as a result, Barker has a financial stake in the State College market (that is, should Penn State prevail, Barker would not be confronted with a competing commercial facility)(Opposition, Att. M; Reply Exceptions at 6).

13. In refusing to add the requested issue, the ALJ, in his *Memorandum Opinion and Order, supra*, declared:

> [Penn State's] petition is untimely filed. Advanced's application was filed in September of 1987. The *Hearing Designation Order* was issued in October of 1988. Advanced initially specified the same site as did Penn State. Penn State has had access to Advanced's application since it was filed. No explanation has been made for its tardiness.
>
> Secondly, Penn State has not demonstrated that Advanced did not have reasonable assurance. [Advanced principal Lynn A. Deppen] contacted [the site owner, Walter D. Barker] in July 1987 and discussed a number of particulars, including rent. As a result of this meeting, he felt he had reasonable assurance of the availability of the site Advanced specified. The fact that Deppen had this conviction is corroborated by the averments of a broadcast technical consultant, and an attorney who is president of a group owning a number of Commission licenses. Subsequent to meeting with Barker, Deppen wrote Barker a letter on July 30, 1987, confirming the contents of their discussion. This letter was unanswered.
>
> Deppen contacted Barker again on September 29, 1987. They discussed rent at a $450 to $855 a month range. Barker apologized for not sending a letter. Penn State admits that Deppen's handwritten notes recording the contact reflect that Deppen believed he had reasonable assurance.
>
> And again, not hearing from Barker, Deppen wrote a letter to Barker on November 23, 1987, expressing his concern and attaching an option agreement along with a $100 payment for the option.
>
> Barker returned the package with a note dated November 30, 1987, which increased the costs of a formal option and lease and stated that Deppen had one week to reply. Deppen did not receive the notice until December 10, 1987. Deppen interpreted the inflated costs as an unwillingness on Barker's part to deal and quickly advised the Commission of the loss of his transmitter site.
>
> Barker does not decisively contradict Deppen's claim of reasonable assurance. Barker's declaration is vague. Although Barker states that he never gave "formal authorization," it is not clear from what Barker states whether he was at no time willing to lease his transmitter site to Deppen. Apparently he would have leased his site to Deppen even as of November 30, 1987, had Deppen met his escalated demands . . . .

14. *Discussion*: With respect to the timeliness of Penn State's original Petition to Enlarge Issues, Penn State argues that it filed within 15 days after receiving documents in the discovery process (*e.g.*, Deppen's notes and letters to Barker), which, it alleges, first raised the questions presented. Advanced avers that the ALJ was correct in holding that Penn State's Petition was untimely, and claims in its reply exceptions (at para. 4):

> Penn State has, throughout this proceeding, specified *the same* transmitter site, the Barker site, as was first specified by Advanced. Penn State's site certification is dated September 15, 1987. Advanced filed its application for a New FM station at State College, Pennsylvania on September 15, 1987. Advanced's site certification is dated September 14, 1987. Three months after filing, on December 15, 1987, Advanced informed the Commission that it no longer had reasonable assurance of the availability of the transmitter site specified in its application. Exactly one month later, pre-designation and before the Commission's issuance of a Public Notice of acceptance for filing, Advanced petitioned the Commission for leave to amend its application to specify a new site. *Penn State filed no Opposition to the petition*. That petition was granted by the Bureau in its [HDO] . . . .Penn State filed its motion to enlarge issues on January 17, 1989, over a year and four months after it reasonably should have become apprised of the fact that Advanced specified its same transmitter site location.

We believe that Advanced's points are well taken. However, given the significance of the matters raised, it is appropriate to address the merits of the underlying allegations. *See Edgefield-Saluda Radio Co.*, 5 FCC 2d 148 (1966); 47 C.F.R. §1.229(c).

15. The Commission's standards for obtaining "reasonable assurance" of an applicant's transmitter site are well-settled. In establishing the new site certification form now appended to FCC Form 301 (and utilized by both applicants here), the Commission declared in its *Order* (*In the Matter of Amendment of Sections 73.3572 and 73.3573 Relating to Processing of FM and TV Broadcast Applications)*, 58 RR 2d 776, 782 (1985)(emphasis added; footnote omitted):

> The Commission has held that although an applicant need not necessarily go as far as to demonstrate absolute assurance, an applicant should be able to show some reasonable assurance that the site for each proposed transmitting antenna is available A mere possibility that a site will be available is not sufficient. *William F. Wallace and Anne K. Wallace,*

49 FCC 2d 1424 (Rev. Bd. 1974). *Commission requirements will be satisfied when an applicant has contacted the property owner or owner's agent and has obtained reasonable assurance in good faith that the proposed site will be available for the intended purpose.*

16. While some latitude is afforded such "reasonable assurance" (*e.g.*, the applicant need not necessarily own the proposed site, nor even pay a significant consideration to purchase or lease in the future, and may even work out the exact terms for lease or ownership at sometime in the future, *see National Innovative Programming Network, Inc.*, 2 FCC Rcd 5641 (1987)), the Commission's "reasonable assurance" standard otherwise remains firm. *See Dutchess Communications Corp.*, 101 FCC 2d 243 (Rev. Bd. 1985); *Shoblom Broadcasting, Inc.*, 93 FCC 2d 243 1027 (Rev. Bd. 1083); *rev. denied*, FCC 84-119, released April 2, 1984, *aff'd mem. sub nom. Royce International Broadcasting Co. v. FCC*, 762 F.2d 138 (D.C. Cir. 1985)(table), *cert. denied*, 47 U.S. 995 (1985). An applicant must possess a *good faith* "reasonable assurance" of the proposed site at the time of filing its application. *62 Broadcasting, Inc.*, 4 FCC Rcd 1768, 1771-72 (Rev. Bd. 1989), *aff'd* FCC 90-48, released February 13, 1990.

17. Here, of course, the question is whether or not there are substantial and material questions of fact sufficient to add site availability and misrepresentation/lack of candor issues against Advanced arising from its initial certification of the Barker tower/transmitter site. In addressing the "substantial and material" standard, the court has declared:

> [T]he Commission may, and indeed must, weigh against the allegations of the petition the other evidence before it, including opposing affidavits filed pursuant to Section 309(d)(1). On the basis of *all* those materials it must decide whether the ultimate question of fact placed in issue . . . is a "substantial" one-- *i.e.*, whether the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for . . . .

Citizens for Jazz on WRVR, Inc. v. FCC, 775 F.2d 392, 395 (D.C. Cir. 1985).

18. Having examined the totality of the record and allegations here, we hold that there are no substantial and material questions of fact sufficient to require a remand of this proceeding with respect to Advanced's "reasonable assurance" of the Barker site. First, Barker's own note (dated November 30, 1987) indicates that he would have leased Deppen space on his tower, provided Deppen met his increased costs. *Compare, e.g., Adlai E. Stevenson IV*, FCC 90R-16, adopted March 3, 1990 (site owner denies slightest indication of assent). Second, with respect to Deppen's initial telephone contact (well before Deppen filed Advanced's application), Barker merely glosses over this call in his declaration: "During the summer of 1987 I received a call [from] Lynn Deppen . . . inquiring about the use of the WZWW tower . . . . I later received a written option . . . but did not sign it." *See* para. 5, *supra*. Conversely, Deppen's contemporaneous hand-written notes made during this call indicate that Barker "is willing to do a lease with me," and Deppen details some nine separate areas of specific discussions concerning the use of, and construction on, Barker's tower. *See* para. 8, *supra*. When given an opportunity for Barker to refute the very precise declaration of Deppen (in Penn State's Reply to Opposition, filed February 8, 1989), Penn State did not include *any* declaration or denial of Barker. Third, Deppen's subsequent actions (letters, follow-up telephone calls, drafts of proposed option agreement, and the tendering of a check to secure the option).(*see* paras. 9-10, *supra)*, are entirely consistent with Barker's demand to Deppen to "hurry up." Fourth, Barker's credibility is open to question, because Penn State now admits that Barker's declaration was not entirely accurate, and it "withdrew" Barker's specific claim that Barker "received several more telephone calls from Advanced's attorneys reqeusting permission to use my site. In the most recent conversation, several weeks ago, I told the attorney for Advanced that Penn State was the only applicant to whom I had given permission . . . ." *See* Barker Declaration, para. 5, *supra*. As Penn State admitted at oral argument: "A year ago when this issue was raised, we went back to Mr. Barker and he said 'well, perhaps it was someone else,' and we withdrew that representation with apologies to Advanced . . . ."(Oral Argument, Tr. 41). Fifth, not only has Penn State failed to demonstrate that there are substantial and material questions of fact sufficient to require a remand as to original site availability, it has essentially conceded that there could be no intent to deceive the Commission by Deppen because, as Penn State's counsel observed at oral argument,"I think it's clear from what we've heard today and what's in the record is that there was a meeting of a mind, Mr. Deppen's mind." (Oral Argument, Tr. 84). While Penn State went on to argue that there was, in any event, an intent to deceive because Deppen knew he had to have a transmitter site (*id.*), we find that Deppen had every reason to believe he had "reasonable assurance" of the Barker site, and no intent to deceive is thus evident.

19. *Advanced's Finances*: In its exceptions, Penn State also advances its claim that the ALJ erred in failing to add a financial issue against Advanced. It urges that, based upon Deppen's deposition testimony, Advanced (1) failed to provide a complete, adequately explained and realistic estimate of proposed construction and initial operating costs; and (2) failed to provide adequate assurance of funds to construct and operate as proposed (Exceptions at paras. 44).

20. In response to the same argument in the proceeding below, the ALJ refused to add the requested issues(s), and in his *Memorandum Opinion and Order*, FCC 89M-1391, released May 9, 1989, declared:

> Petitions to enlarge must be supported by affidavits of persons with personal knowledge unless official notice can be taken of the allegations made . . . Penn State's allegations are merely its own interpretations of what Deppen's testimony is or means. They amount to no more than surmise and speculation. Penn State has failed to demonstrate that the issues requested are warranted.

21. *Discussion*: In its Reply Exceptions (at paras. 19-20), Advanced observes:

> Penn State's allegations are not only devoid of factual support but are also based on assumptions that are directly contrary to record evidence. As set forth in Advanced's April 21, 1989 Opposition to Motion to Enlarge Issues . . . the deposition testimony which Penn State purports to rely upon in fact corroborates that Advanced's sole voting principal, Lynn Deppen, prior to certification, apprised himself of prosecution, construction and first three months' operating costs for his proposed facility. Additionally, prior to certification, he reviewed his bank statement and broker's statement and assured himself that he possessed liquidity in excess of budgeted costs. As a part of Mr. Deppen's work as Corporate Director of Engineering for Keymarket Communications, a multiple broadcast station owner, he determined budget costs. Mr. Deppen maintains a voluminous file of cost estimates covering all radio station equipment. He relied upon this data to establish his estimate of equipment costs for the station before he certified. Mr. Deppen is a radio technical consultant by profession and had advised others on budgeted costs. He has also consulted with an equipment supplier concerning costs. Last, he was privy to operating cost data in the possession of Keymarket's accounting department which he had reviewed prior to certification. To call this testimony into question requires more than mere conjcture. yet that is all Penn State offers.
>
> Penn State argues that Advanced presented mere liquidity and not net liquidity. This flies in the face of the Deppen declaration appended to the April 21 Opposition which makes explicitly clear that Deppen is relying upon his own personal assets and the assets upon which he relies are indeed *net* liquid assets.

22. More specifically, Deppen's declaration (Advanced's Opposition to Petition to Enlarge Issues) states the following (Exhibit I):

> As the only shareholder in Advanced, I am relying on my own personal assets to cover prosecution, station construction and first three months' station operating costs. In that regard, before I certified to the accuracy and completeness of Advanced's application, I had exact knowledge of the amount of my liquid assets. I knew how much cash existed in my bank account, how much I possessed in Certificates of Deposit and how much I possessed in stocks. I had reviewed my own personal bank statement and my broker's statement of my stock assets before I certified. I knew the amount of my personal debts, which are few, and consist then as now of minor credit card debt and my home mortgage. Subtracting my debts from my assets, I knew how much I had available. I determined that I possessed an amount in excess of my budgeted costs for prosecution, station construction and first three months' station operation. Upon this basis, I determined to proceed with the application . . .

23. Based upon the foregoing, and the lack of any probative refutations by Penn State, we hold that the ALJ did not err in refusing to add financial issues with respect to Advanced, and there are no substantial and material questions of fact concerning Advanced's finances sufficient to require a remand here. *See generally Armando Garcia*, 3 FCC Rcd 1065 (Rev. Bd. 1988), *aff'd*, 3 FCC Rcd 4767 (1988); *See also Priscilla L. Schwier*, 3 FCC Rcd 4355 (Rev. Bd. 1988), *review denied*, 4 FCC Rcd 2659 (1989), *aff'd by judgment sub nom. New Life Evangelistic Center, Inc. v. FCC*, No. 89-1286, D.C. Cir. February 7, 1990 (absent probative evidence, Commission will not go behind financial certification).

PENN STATE EXCEPTIONS TO COMPARATIVE CONSIDERATIONS

24. *Penn State's Diversification Demerit*: In its Exceptions, Penn State argues that it "should not have been assessed a comparative demerit for its ownership of other non-commercial broadcast stations" (Exceptions at para. 63). At oral argument, however, Penn State quickly retreated from this position (Tr. 59):

> Well, I think in candor we should say that we probably overstated our position a little bit . . . . We probably should receive a slight demerit, on reflection.

25. As the only authority for its position, Penn State references the Board's decision in *Talleyrand Broadcasting*, 103 FCC 2d 476, 478 (Rev. Bd. 1985)[3] where it was stated:

> We have held that [non-commercial FM] stations, albeit cognizable media interests under Commission policy, have a somewhat lesser diversification importance than commercial stations as a general rule.

However, the Board has also made clear that:

> Nowhere in the [1965] *Policy Statement*, our most comprehensive manual, does the Commission parse the many categories of media voices into profit and nonprofit classes. Nor can it be seriously argued at this late date that noncommercial stations do not constitute prominent media voices in the community, for whatever the "educational" character of noncommercial stations at their genesis, that character has been indelibly altered by myriad developments over the ensuing decades.
>
> * * *
>
> [T]here can be no current doubt that contemporary noncommercial stations constitute an important and effective media voice in the communications community. In light of these considerations, we did not, and do not now, believe that it is reasonable or appropriate to categorically ignore an applicant-principal's controlling ties, if any, to noncommercial broadcast stations, for such stations plainly have a vital impact on the matter of overall diversification of control of our various media voices.

San Joaquin TV Improvement Corp., 96 FCC 2d 617, 620-21 (Rev. Bd. 1984)(subsequent history omitted).

26. Here, Penn State has not pledged that it will divest itself of WPSU(FM), State College. Indeed, it specifically plans to retain this facility and "convert WPSU into a student oriented station; a training facility for students" (Oral Argument, Tr. 59). In light of the foregoing, Penn State's interest in WPSU(FM), apparently a Class A FM facility (*see* note 1, *supra*), licensed to the same community as the facility sought herein, coupled with its other broadcast interests, must result in the affirmance of the ALJ's assessment of a substantial diversification demerit against Penn State. *WFSP, Inc.*, 99 FCC 2d 444, 445 (Rev. Bd. 1984); *See Brownfield Broadcasting Corp.*, 93 FCC 2d 1197 (Rev. Bd. 1983); *Colorado West Broadcasting, Inc.*, 57 FCC 2d 526 (Rev. Bd. 1976).

27. *Penn State's Claim for "Local Residence" Credit*: Although Penn State admits that it does not seek any "integration" credit here, it claims that it is, nevertheless, entitled to a "local residence" enhancement. Recognizing that "[i]n the case of non-profit corporations such as Penn State, the Commission has held that the governing board is the equivalent of ownership for purposes of integration" (Exceptions at 25 n. 5), Penn State here seeks the functional equivalent of Advanced's integration credit, *but without* proposing that any of its 32 governing board members be involved with day-to-day management of the station. We reject its unprecedented request. In order to permit non-profit organizations to acquire "ownership" integration credit, the Commission has already provided a mechanism whereby governing board members will be treated as coextensive with actual proprietors for integration credit under the *1965 Policy Statement*. That is, there must be a pledge on the part of trustee(s) to personally work at the proposed facility. *See Priscilla L. Schwier, supra*, 3 FCC Rcd 4357 (three trustees will each occupy full-time managerial role at station); *Reginald A. Fessenden Education Fund*, 100 FCC 2d 440, 447, 451 (Rev. Bd. 1985), *review denied*, 59 RR 2d 1267 (1986). Without engaging that established mechanism, the Board cannot accord with Penn State's request.

28. It is also clear from the 1965 *Policy Statement*, and an unbroken line of hundreds of comparative cases, that local residency is but an adjunct of *personal* integration. We cannot award residence credit to bricks and mortar. Local residency is considered important insofar as it assumes a familiarity by controlling *owners* (or equivalent board members) with local problems, needs and interests. Here, it is not clear *who* will manage Penn State's proposed station, let alone the length and depth or their residence. As a subordinate body with no policymaking authority, the Board cannot fashion a *cy-pres* local residence standard cut to fit Penn State's particular circumstances.

29. *Penn State's Claim for "Specialized Programming" Issue*: In the proceeding below, Penn State sought the addition of a "specialized programming" issue, based upon its "lengthy and intimate connections" with the community of State College, and because it is "uniquely qualified, on a comparative basis, to meet the needs and interests of the community" (Exceptions at para. 19).

30. In refusing to add this issue, the ALJ stated in his *Memorandum Opinion and Order*, FCC 89M-132, released January 17, 1989, that:

> The Commission has consistently denied preference for specialized programming formats absent a showing that the proposed programming will meet unmet needs and that such programming is not already available in reasonable amounts. (*Cf. Cameron Communications*, 71 FCC 2d 460 (1979); *Flint Family Radio, Inc.*, 69 FCC 2d 38 (Rev. Bd. 1977). Penn State has proposed public radio programming, that is non-commercial programming, on the non-reserved commerical FM channel 233A allotted to State College. However, Penn State's ownership of WPSU, a non-commercial FM station serving State College, defeats its very claim that an unmet need for non-commercial programming exits. Indeed, it may fairly be said that public radio programming exists in a substantial amount. WPSU typically operates 18-24 hours per day. Additionally, it appears that some of WPSU's programming is duplicated on Penn State's television station WPSX-TV . . . .

31. Penn State, in fact, details many of its programs already available on WPSU(FM) in the State College area in its Exceptions (at paras. 24-25):

> WPSU is affiliated with National Public Radio and broadcasts the critically-acclaimed "All Things Considered" news program in the evening as well as the "Morning Edition" and "Weekend Edition" news broadcast. Each weekday, WPSU broadcasts "Midday Magazine," a combination of national and local material. The local segments include regular reports on community issues. In addition to the National Public Radio programming, WPSU broadcasts its own local public affairs programming including "Perspectives," a broadcast focusing on the needs and concerns of the minority community; "Open Line," which treats community issues of broader concern; and regular programs for and about the international communities represented in the State College area.
>
> WPSU's music programming is more than repetition of tried and true formulas. Each afternoon, community volunteers program "Afternoon Classics," a thoughtful program of serious music. The program provides detailed commentary on each piece, thus providing a rich educational experience in addition to pleasant listening. Each evening WPSU broadcasts "The New Music Show" for devotees of non-mainstream rock. This music is not available on commercial radio stations in State College. The broadcast also presents specials on such topics as the political influence of New Music and the history and development of alternative rock. Recently, WPSU presented a week-long examination of the alternative rock scene in Central Pennsylvania. WPSU also makes time available for other specialized music forms not available on commercial stations in State College including folk, blues, black artists, heavy metal, oldies, Jamaican, African and gospel music, among others. In every aspect of its programming WPSU has demonstrated a superior devotion to public service. Its programming is not duplicated by existing stations in State College . . . .

32. In *George E. Cameron, Jr. Communications*, 71 FCC 2d 460, 464-466 (1989)(subsequent history omitted), the Commission held that inquiry into the relative need for specialized programming under the standard comparative

issue would be permitted only upon a threshold showing that the proposed format is not available in the particular market in a "substantial amount." *See also Comparative Broadcast Hearing Procedures*, 75 FCC 2d 721 (1980); *Wilshire District Broadcasting Co., Inc.*, 101 FCC 2d 908 (Rev. Bd. 1985). Moreover, in *Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090, 1098 (Rev. Bd. 1982), the Board concluded that 21 hours of a certain variety of specialized programming in the service area was ample to meet the Commission's "substantial amount" test and to defeat the request to add a specialized format issue. The Commission did not disturb this holding. *See Order*, FCC 83-129, released November 9, 1983. In light of this case precedent, and Penn State's concession that it already broadcasts some 18-24 hours *per day* of the heretofore described programming on WPSU(FM), Penn State's exceptions in this regard must fail.[4] *See Religious Broadcasting Network*, 3 FCC Rcd 4085, 4102 (Rev. Bd. 1988).

CONCLUSIONS

33. We have here determined that both applicants are fully qualified to be licensees of the Commission. More specifically, with respect to Advanced, we find no substantial and material questions of fact remaining for resolution through a remand proceeding concerning its basic qualifications. Advanced is awarded 100% "integration" credit of its principal, Lynn A. Deppen. Conversely, Penn State is awarded no integration credit whatsoever. On this critical criterion alone, Advanced would easily prevail. *Family Broadcasting Group*, 93 FCC 2d 771, 778 (Rev. Bd. 1983); *Julia S. Zozaya*, FCC 90R-9, released February 15, 1990. Further, having reviewed all other decisionally significant comparative exceptions,[5] we have determined that Penn State is not entitled to any enhancement for "integration" for "local residence," and Penn State, which already operates a full-time FM facility at State College, is not entitled to an issue on its proposed programming. Indeed, even if it were determined that such an issue should be added and remanded for further hearings, a result favorable to Penn State could not overcome the decisional preferences awarded to Advanced.

34. ACCORDINGLY, IT IS ORDERED, That the application for construction permit for a new FM broadcast facility at State College, Pennsylvania, filed by the Board of Trustees of the Pennsylvania State University (File No. BPH-870915MD), IS DENIED; and the application of Advanced Broadcast Technologies, Inc. for this facility (File No. BPH-870915MC), IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] In its Exhibit No. 1, sponsored by Marlow Froke, General Manager, Division of Media and Learning Resources at Penn State, and throughout its Exceptions, Penn State claims that its existing FM facility licensed to State College is only a "Class D" station. Section 73.506(a)(1) of the Commission's Rules, 47 C.F.R. §73.506(a)(1), provides that an FM facility shall be designated "Class D" if it "is one operating with no more than 10 watts transmitter power." The files of the Commission (official notice taken) indicate that WPSU(FM) utilizes a 1 kilowatt transmitter. Penn State concedes its station is licensed to operate with an effective radiated power (ERP) of 870 watts (with a tower height of -81 feet HAAT). *See* Exceptions at para. 44. Pursuant to 47 C.F.R. §§211(a) and (b), a Class A FM station must operate with a minimum ERP of 100 watts, and a maximum effective radiated power of 3,000 watts.

[2] Rand McNally Road Atlas (Golden Anniversary Edition) at 88-89.

[3] *Talleyrand* is the proceeding in which Walter D. Barker emerged as the victor for his now-existing FM facility at Bellefonte, Pennsylvania. It was there revealed that he was "chief engineer at WTLR-FM, a non-commercial station located at State College, Pennsylvania, which community is adjacent to Bellefonte." 103 FCC 2d at 477.

[4] Eschewing Penn State's express request (Exceptions at 19-42), we will not regard a "public radio" program format as inherently "a superior devotion to public service." *Id.*, at 24. As discussed much more fully in *Seattle Public Schools*, 4 FCC Rcd 625 (Rev. Bd. 1989), non-commercial broadcasters employ a wide variety of formats these days, with explicit FCC approval. In *Seattle*, for example, a non-commercial licensee was challenged for emulating a "commercial" radio format (with much rock music), and it is curious here that Penn State seeks special credit for programming that includes a daily session of "non-mainstream rock" *(see supra* para. 31). In general, we cannot prefer a particular format. *See* 47 U.S.C. §326 (anticensorship provision); *see generally WNCN Listeners Guild v. FCC*, 450 U.S. 582 (1981).

[5] In light of our resolution of this proceeding, Penn State's exceptions to Advanced's enhancements for past local residence and past broadcast experience (Exceptions at 64-67) are non-decisional.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-3

In re Applications of

COLONIAL COMMUNICATIONS, INC.	File No. BPH-860801MB
BEDFORD CONCEPTS, A CALIFORNIA LIMITED PARTNERSHIP	File No. BPH-860804ME
DONNA M. MacNEIL	File No. BPH-860804MF
APPLEDORE COMMUNICATIONS, INC.	File No. BPH-860804MI

For Construction Permit for a
New FM Station, Channel 243A
in Bedford, New Hampshire

Appearances

Martin E. Firestone and *Howard M. Weiss* on behalf of Colonial Communications, Inc.; *Terence L. Bruiniers*, on behalf of Bedford Concepts, A California Limited Partnership; *Richard F. Swift* on behalf of Donna M. MacNeil; and *Barry A. Friedman*, *Rebecca L. Dorch* and *Michael Drayer* on behalf of Appledore Communications, Inc.

DECISION

Adopted: March 14, 1990; Released: March 30, 1990

By the Review Board: BLUMENTHAL and ESBENSEN.

Board Member BLUMENTHAL:

1. This proceeding involves four competing applicants who seek authority to construct a new FM broadcast station at Bedford, New Hampshire. The applications were set for hearing on the standard comparative issue, *see Hearing Designation Order*, 3 FCC Rcd 517 (1988), and the issues were enlarged by Presiding Administrative Law Judge Richard L. Sippel (ALJ) to determine whether Bedford Concepts, A California Limited Partnership (Concepts) was timely organized as a limited partnership and whether it failed to amend its application, pursuant to Section 1.65 of the Commission's Rules, 47 C.F.R. §1.65, to report the withdrawal of two limited partners, *see Memorandum Opinion and Order*, FCC 88M-2179, released July 11, 1988. In an *Initial Decision* (I.D.), 4 FCC Rcd 5969 (1989), the ALJ disqualified Concepts under the Rule 1.65 issue and determined that Donna M. MacNeil was the comparatively superior applicant. The proceeding is now before the Review Board on exceptions. In addition, pursuant to the Board's directive contained in *Colonial Communications, Inc.*, 5 FCC Rcd 51 (Rev. Bd. 1990), MacNeil has submitted supplemental information pertaining to her financial status. We have reviewed the I.D. in light of the record, as supplemented, the pleadings before us, and the oral argument heard December 13, 1989. We adopt the ALJ's findings of fact, except as modified herein, and affirm his grant of the MacNeil application.

MacNeil's Basic Qualifications

2. Appledore Communications, Inc. (ACI) and Colonial Communications, Inc. (Colonial) except to the ALJ's repeated refusals to add financial qualifications and related misrepresentation issues against MacNeil. *See Memorandum Opinion and Order*, FCC 88M-2178, released July 6, 1988; *Memorandum Opinion and Order*, FCC 88M-3416, released October 14, 1988; and *Memorandum Opinion and Order*, FCC 89M-488, released February 13, 1989. The initial request for enlargement arose over MacNeil's failure to produce pre-hearing documentation of her finances, *see* FCC 88M-2178, *supra*, segued into an attack on the adequacy of the documentary evidence subsequently produced, *see* FCC 88M-3416, *supra*, and devolved finally into allegations that encumbrances on MacNeil's assets neutralized her financial capability. *See* FCC 89M-488, *supra*. These attacks were repeated in the exceptions (ACI Br. at 14-24; Colonial Br. at 3-17) and prompted the Board to direct MacNeil to supply an updated report on her financial status. *See Colonial Communications, Inc.*, *supra*. Specifically, we noted that the ALJ properly refused to specify a financial issue based on MacNeil's documentation, which included her personal balance sheet depicting her financial condition at the time of her application in August 1986, her certificates of deposit of over $150,000, and a line of credit from The Bedford Bank in excess of $275,000. *Id.* We observed, however, that MacNeil's residence had since been encumbered (in 1988) for $950,000, and that this could affect the line of credit. *Id.* We further stated, in view of another large mortgage on non-residential property owned jointly by MacNeil and her husband, that MacNeil should produce a joint balance sheet indicating those assets she relies on to finance the station. And finally, we opined that MacNeil should verify any personal liquid assets she relies upon, or document any loan agreement with a financial institution if she is relying instead on those funds. *Id.*

3. In her supplement filed January 24, 1990, MacNeil submits a joint balance sheet for her husband and herself as of December 31, 1989, listing total assets in excess of $9,000,000, including short-term certificates of deposit of $600,000 ($200,000 in her name, $200,000 in his name, and $200,000 held jointly), and a net worth of over $6,000,000; a letter from Andre R. Bonte, Jr., Vice President, First NH Bank, N.A. (successor to The Bedford Bank) restating the bank's commitment to provide financing for the construction of the proposed station in the amount of $350,000; a letter from Mr. MacNeil reconfirming his earlier agreement that his wife may use their jointly held assets in order to finance her FM proposal; and a declaration from MacNeil that she will fund the station through the line of credit (which, she claims, is

sufficient to cover her estimated costs), and that funds will also be available, if desired, from her personal assets and the jointly held assets.

4. From the foregoing, it appears that MacNeil has satisfied the Commission's traditional test of providing reasonable assurance of the availability of a bank loan to finance the proposed station. *See Jay Sadow*, 39 FCC 2d 808, 810 (Rev. Bd. 1973). Although Colonial and ACI, in their supplemental comments, object to MacNeil's reliance on the letter from the First NH Bank, we believe their showing is inadequate to raise material or substantial questions as to the validity of the letter or the bank's ability to make the loan. *Id.* The bank commitment, upon which MacNeil makes clear she primarily relies, has now been stated and restated in a series of letters dated August 1, 1986, February 22, 1988, July 29, 1988, August 29, 1988, and January 22, 1990, and has been available to MacNeil since before she filed her application. *See* MacNeil Opposition to Motion to Enlarge Issues, filed August 31, 1988, Atts. A, B. The bank has also specifically referenced its long business relationship with MacNeil and repeatedly indicated that it is familiar with MacNeil, with her personal assets and liabilities, and with her plans for the proposed station. *Id.* (Letters dated July 29, 1988; January 22, 1990). Thus, unlike the situations adverted to by exceptors in such cases as *Shawn Phelan*, 5 FCC Rcd 53 (Rev. Bd. 1990) and *Marlin Broadcasting*, 4 FCC Rcd 7945 (Rev. Bd. 1989), where the overall circumstances raised significant questions as to whether the bank letters were mere accommodations, MacNeil's status here is more akin to that of the "personally and favorably" known borrower in *Multi-State Communications, Inc. v. FCC*, 590 F.2d 1117 (D.C. Cir. 1978), whose bank letter was deemed to be acceptable. Indeed, any question that the bank is distressed by the 1988 mortgage debt on MacNeil's personal residence is answered by the most recent bank letter, dated January 22, 1990, stating that the bank is "familiar . . . with your personal financial situation" and is willing to advance the funds. Furthermore, the bank here has set forth its key terms and conditions for the loan, and MacNeil has agreed to them. *See* MacNeil Supplement, dated January 24, 1990. While Colonial objects to the letter because it states it is not contractually binding and is premised on MacNeil's financial condition being satisfactory to the bank at the time the loan is made, it is well settled that the reasonable assurance standard does not require a binding legal certainty that a loan will be made, *see Las Vegas Valley Broadcasting Co. v. FCC*, 589 F. 2d 594, 599-601 (D.C. Cir. 1978), and bank commitment letters are traditionally and understandably conditional upon review of the applicant's financial health at the time the monies are actually advanced. *Id*; *Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166, 167 (1980). Although exceptors also complain that the bank has not specified the security, this omission is not critical here (although MacNeil has agreed to provide security) where the bank has expressed a firm and specific willingness to make the loan, specified the amount, interest rate, and repayment terms, and stated its favorable acquaintance with MacNeil. *See Multi-State Communications, Inc. v. FCC, supra*. In sum, we affirm the ALJ's ruling that MacNeil's primary reliance on a bank loan at the time she filed her application was sufficient, without more, to provide reasonable assurance of her financial qualifications and to dispel any collateral doubts about her representations at that time.[1]

5. In a further assault on the MacNeil application, ACI and Colonial except to the ALJ's refusal to add site availability and suitability issues against MacNeil. *See Memorandum Opinion and Order*, FCC 88M-1191, released April 21, 1988, *Memorandum Opinion and Order*, FCC 88M-2134, released July 8, 1988, *Order*, FCC 88M-2517, released August 3, 1988, and *Memorandum Opinion and Order*, FCC 88M-2950, relesed September 8, 1988. The ALJ dealt properly with these repetitious requests in his aforenoted rulings and extended discussion is thus unnecessary. The gravamen of the complaint pertaining to site availability is that MacNeil never spoke personally to the land owner or the tower owner and thus never secured reasonable assurance of her proposed site. We disagree. MacNeil's application identified the landowner, John Hersey, and the owner of an existing tower on that land, David Johonnett, and indicated an intention to side-mount the proposed antenna on Johonnett's existing structure. The record evidence establishes that, in order to determine whether the site would be available, MacNeil personally contacted and spoke with the landowner, Mr. Hersey (Tr. 154, 200; Declaration of Donna M. MacNeil, attached to MacNeil Opposition to Motion to Enlarge, filed May 27, 1988); and that at MacNeil's request, and acting as her representative, Gary Howard, an experienced broadcaster who assisted her in preparation of the application, visited the Johonnetts and received express permission for MacNeil to lease space on the tower for her FM antenna. (Declaration of David P. Johonnett, Declaration of Donna Johonnett, Declaration of Gary A. Howard, Declaration of Donna M. MacNeil, attached to Opposition to Motion to Enlarge, *supra*; Deposition of Donna MacNeil, pp. 31-32, attached to Supplement to Opposition to Motion to Enlarge, filed June 22, 1989, by MacNeil). Moreover, Johonnett specifically stated that he was "satisfied with the terms and conditions" of the lease agreement with MacNeil. (David Johonnett Declaration, *id.*). It thus appears that no material or substantial question of fact existed regarding the site's availability at the time MacNeil certified her application and that the site remains available to her for the intended purpose. *Cf. National Innovative Programming Network, Inc.*, 2 FCC Rcd 5641 (1987); *Puopolo Communications, Inc.*, 60 RR 2d 964, 966 (Rev. Bd. 1986) (parties' agents may negotiate site availability). As to the suitability of the proposed site, the ALJ correctly found that prior to certification MacNeil had properly relied on the specific recommendation provided by her engineering firm and the advice of an experienced broadcaster in making her antenna proposal; that in response to her oppoents' subsequent allegations she obtained the statement of a second engineer whose structural review also indicated that the proposal was suitable and recommended the use of guy wires to ensure stability; that the tower owner expressly stated that he was satisfied that he and MacNeil could work out any problems that might arise concerning the FM tower; and that the land owner had no objection to the anchoring of guy wires on his land if they are needed. (Technical Statement of Louis R. Du Treil, P.E., Declaration of Gary A. Howard, Deposition of Donna MacNeil, pp. 28, 31, Statement of Donald J. Neubauer, Consulting Engineer, Declaration of Donna MacNeil, attached to MacNeil Opposition to Motion to Enlarge, filed July 21, 1988; Declaration of John Hersey, attached to MacNeil Supplement to Opposition to Motion to Enlarge, filed August 16, 1988; Declaration of David P. Johonnett, attached to MacNeil Opposition to Motion to Enlarge, filed May 27, 1988). In sum, we agree with the

ALJ that MacNeil had obtained reasonable assurance of both the suitability and availability of her proposed site at the time she filed her application and that no serious doubts in this regard have since been raised.

Comparative Issue

6. The ALJ fully credited the integration proposals of Colonial, MacNeil, and ACI, but based on substantial credits awarded MacNeil for local residence, civic involvement, and female status, the ALJ concluded that MacNeil was the comparative winner. I.D., para. 88. Colonial, which received a slight coverage preference, was ranked second, Concepts contingently placed third, and ACI was ranked last because of a diversification demerit. I.D., para. 90. All applicants have excepted in varying ways to these conclusions, and we now address the decisionally significant exceptions, particularly as they may bear upon the winner below, MacNeil.[2]

7. ACI, Concepts, and Colonial all except to the ALJ's award of 100% integration credit to MacNeil. At best, exceptors argue that MacNeil should receive no more than 50% credit because (1) she testified that she would only spend limited hours per week at the station; (2) she knew little about broadcasting and intended to hire a station manager; (3) she relied on a personal friend, Gary Howard, to assist her in the preparation of the application; (4) MacNeil and her husband are co-owners and joint venturers in their other business activities, and (5) under New Hampshire law, MacNeil's use of a joint account to pay application expenses means that Mr. MacNeil must be considered the *de jure* owner of 50% of the MacNeil application. We disagree that MacNeil's integration credit should be reduced below 100%. The record fully supports the I.D.'s conclusion that MacNeil is an individual applicant intending to work as general manager on a full-time basis. Specifically, the evidence establishes that MacNeil initiated the project herself without any participation by her husband (Tr. 146, 193, 215-217), and although she relied on a friend and experienced broadcaster, Gary Howard, in preparing the application, she was active in retaining communications counsel and an engineer, in securing reasonable assurance from the site owner for her tower, and in arranging for her own financing (Tr. 146-149, 211, 151-154, 200-204, 206-207; I.D., paras. 62-63). She decided to be general manager and neither Mr. Howard, who is the permittee of an FM station at Meredith, New Hampshire, nor her husband, will work at the station (*Id.*; Tr. 155, 162-163, 167-168, 175, 211).[3] Furthermore, while exceptors correctly observe that MacNeil and her husband have operated businesses together in the past (*see* I.D., para. 59), she has for ten years solely owned and managed a general store and ice cream parlor in Manchester, New Hampshire, where she is responsible for bookkeeping, office management, staff supervision, hiring and firing, public relations, and facility maintenance. (*Id.*, at paras. 61, 64). Moreover, MacNeil's plans to run the station with the assistance of a station manager are hardly unusual, *see, e.g., Posey County Broadcasting Corp.*, 4 FCC Rcd 8347 (Rev. Bd. 1989), and she has specifically explained how she could turn over her general store management activities to her husband, or if he declined, to a third party, thus freeing her to work full-time at the station. (Tr. 176-177, 188, 216; MacNeil Exh. 1; I.D., para. 66). Finally, while the parties dispute the import of provisions of New Hampshire's joint property law, we have held many times that our integration analysis is not controlled by local statute but by Commission policy and precedent and the facts of record. *See, e.g., Mark L. Wodlinger*, 3 FCC Rcd 3139, 3140 (Rev. Bd. 1988); *Bradley, Hand and Triplett*, 89 FCC 2d 657, 662-663 (Rev. Bd. 1982). Indeed, we have specifically held that the use of joint funds to prosecute and construct a station is not in and of itself determinative of intended joint operation. *Richard P. Bott, II*, 4 FCC Rcd 4924, 4929 (Rev. Bd. 1989).[4]

8. We also reject ACI's exception that the I.D. incorrectly awarded qualitative enhancement credits for local residence and civic participation to the competing applicants. Specifically we agree with the I.D. (para. 88) that MacNeil's local residence credit is substantial, and we further find that it exceeds that of ACI and Colonial. MacNeil has lived in the service area continuously since 1966 and in Bedford itself since 1972, whereas Steven Silberberg, ACI's 100% voting stockholder, grew up within the service area but only returned to the area when he moved to Bedford in 1984, and James Gold, Colonial's 100% voting stockholder, moved to the service area in 1977, lived in Bedford from October 1977 to September 1978, and has lived there since 1981. (I.D., paras. 39, 58, 70, 72). Thus, MacNeil's current Bedford residence is by far the longest and most continuous, and the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965) prefers longer duration because it increases the likelihood that an applicant will have knowledge of and pay attention to changing local needs and interests. *See Radio Jonesboro, Inc.*, 100 FCC 2d 941, 945 (1985). Likewise, MacNeil is entitled to the substantial civic participation credit awarded by the ALJ (I.D., para. 88). MacNeil devoted more than 1,000 hours to fundraising activities on behalf of Elliot Hospital over a seven year period, spent ten years as a fundraiser for a local Bedford church, and, contrary to ACI's claim that her activities have been discontinued, MacNeil periodically raises money for the Bedford rotary club and other organizations through her general store. (I.D., para. 60; MacNeil Exh. 1). We also agree with the ALJ that the participation of ACI's Silberberg in two organizations over three or four years is cognizable but of somewhat lesser weight than MacNeil's longer-term activities, and specifically uphold the ALJ's ruling (excepted to in ACI's Brief, at 46, n 25) striking portions of ACI Exh. 4, which sought credit for Silberberg's involvement in state-wide, as distinct from local, organizations and activities. *See The Baltimore Radio Show, Inc.*, 4 FCC Rcd 6437, 6441, (Rev. Bd. 1989).

9. Thus, MacNeil prevails over both ACI and Colonial under the "fundamental . . . public interest consideration" of local residence, *see Radio Jonesboro, Inc., supra*, 100 FCC 2d at 945, as well as for civic participation, which is "considered as a part of a participating owner's local residence background." *Policy Statement, supra*, 1 FCC 2d at 396. In addition, MacNeil's integration is enhanced over the others by virtue of her female status. The credit due ACI and Colonial for their owners' broadcast experience, which is a factor traditionally accorded "minor significance," *id.* at 396, is insufficient to overcome MacNeil's multiple enhancement advantages. Moreover, although the ALJ awarded Colonial a slight preference over MacNeil (and ACI) for greater overall coverage to well-served areas, we believe Colonial's approximately 38,000 person advantage in an area receiving five or more aural services merits only a modest or very slight pref-

erence. *See Barton Broadcasting Co.*, 104 FCC 2d 785, 790-791 (Rev. Bd. 1986) (and cases cited therein). After properly weighing Colonial's small coverage advantage, MacNeil would still prevail on the strength of her superior integration, which is a factor of "substantial importance." *Policy Statement*, *supra*, 1 FCC 2d at 395.[5] In sum, we have reviewed all decisionally significant exceptions and conclude that grant of MacNeil's application will best serve the public interest, convenience, and necessity.[6]

10. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed August 18 and September 26, 1989 by Appledore Communications, Inc. ARE GRANTED, and the amendments ARE ACCEPTED; that the petition for leave to amend filed March 6, 1990 by Colonial Communications, Inc. IS GRANTED and the amendment IS ACCEPTED; that the motions to strike filed October 31, 1989 by Donna M. MacNeil ARE DENIED; that the motion to reopen the record and remand filed October 6, 1989 by Appledore Communications, Inc. IS DENIED; and

11. IT IS FURTHER ORDERED, That the application of Donna M. MacNeil (File No. BPH-860804MF) for a construction permit for a new FM station in Bedford, New Hampshire IS GRANTED; and the applications of Colonial Communications, Inc. (File No. BPH-860801MB), Bedford Concepts, A California Limited Partnership (File No. BPH-860804ME), and Appledore Communications, Inc. (File No. BPH-860804MI) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] The ALJ also noted the large sums available to MacNeil in the form of certificates of deposit and held that it was unnecessary to consider the liquidity of her other personal assets in light of these deposits and the bank loan. FCC 88M-3416, *supra* at para. 6. Exceptors now argue, however, that the MacNeils' joint balance sheet is deficient because it fails to segregate short-term from long-term liabilities, and provides no appraisals to support the liquidity of the MacNeils' considerable assets other than cash and certificates of deposit. Were MacNeil necessarily dependent on these other assets to finance her proposal, this point would be well-taken. Here, however, MacNeil has made clear that she will finance the station through the line of credit, which is sufficient to cover her projected costs, and will rely on her personal and jointly held assets only as needed. Moreover, even accepting, *arguendo*, Colonial's suggestion (Comments at p. 7) that the current portion of the joint liabilities could be as high as approximately $300,000, this figure is considerably less than the liquid assets shown on the balance sheet (certificates of deposit and cash) of over $600,000.

[2] We need not dwell at length on the Concepts application. Concepts was disqualified because its application misleadingly referred to the presence of certain limited partners who in fact were not part of the application, and this misimpression was never corrected by amendment in accordance with Rule 1.65, 47 C.F.R. §1.65. *I.D.*, para. 80. In its exceptions, Concepts argues with some force that although its application made an erroneous reference to persons who were not limited partners and should have been timely corrected, there was no intent on its part to mislead or deceive the Commission. (Concepts Br. at 9-10). Even assuming *arguendo* that the record does not support a finding of deliberate concealment of material information with intent to deceive, *see Merrimack Valley Broadcasting, Inc.*, 55 RR 2d 23 (1983), and even if Bedford were further found to be entitled to full integration credit, a finding not supported by the I.D., it would still not prevail over MacNeil. The latter readily prevails on the multiple grounds of local residence, civic participation, and female ownership (100% v. 50%); Concepts' sole advantage for broadcast experience and very small coverage edge cannot outweigh these factors. *See* para. 9, *infra* ; *Mark L. Wodlinger*, 101 FCC 2d 762, 773 (Rev. Bd. 1985).

[3] We agree fully with Concepts' statement at p. 22 of its exceptions that " . . . there is nothing improper *per se* in the assistance Ms. MacNeil received from Mr. Howard . . . ."

[4] We also reject Colonial's challenge to MacNeil's specific hourly commitment because the context of MacNeil's testimony is that she would work at the station as she has worked at her general store, that is, 60-80 hours per week (Tr. 174), that she is a "workaholic . . . [who] love[s] work" (Tr. 189), and that she intends to work fulltime at the station (MacNeil Exh. 1, p. 4).

[5] Two other matters raised by ACI may be briefly treated. First, ACI's comparative case was materially faulted by the I.D. for failing to timely pledge to divest an interest in Station WNCS (FM), Montpelier, Vermont, which was acquired in February 1987 after the "B cut-off" date in this proceeding. (I.D., para. 84). ACI now submits a copy of an amendment (which was not introduced into evidence at the hearing) indicating that on March 27, 1987 it pledged to divest this interest. (ACI Br., Att. A). It is not clear, however, that ACI's amendment pledge was "sufficiently contemporaneous" with the acquisition of the Montpelier station to be credited even if the evidence were properly before the ALJ, *see Jerome Thomas Lamprecht*, 99 FCC 2d 1219, 1222 (Rev. Bd. 1984), and, in any event, removal of ACI's diversification demerit would still leave it well behind MacNeil under the integration analysis set forth above.

Second, ACI excepts to the ALJ's *Memorandum Opinion and Order*, FCC 88M-1176, released April 21, 1988, which denied ACI's request for a "minority sensitivity" issue. The ALJ ruled that ACI's showing in support of the issue was insufficiently specific as to programming and demographics and thus did not satisfy the prerequisites for such an issue as discussed in *San Joaquin TV Improvement Corp.*, 96 FCC 2d 594, 600-603 (Rev. Bd. 1983). Conceding that its claim "lie[s] in a murky area of the FCC's regulatory body of law" (ACI Br. at 11), ACI nonetheless disputes the need for such specificity. We disagree with this exception. To begin with, the facts here are notably different than in *San Joaquin*, where an applicant relying on the court's supplemental opinion in *TV 9, Inc. v. FCC*, 495 F. 2d 929 (D.C. Cir. 1973), *en banc rehearing denied*, 495 F. 2d 941 (1974) (Supplemental Opinion), sought to *offset* meritorious consideration of a competitor's minority ownership by countervailing evidence of its own minority sensitivity; in this case, by contrast, no applicant qualifies for minority ownership credit and there is nothing therefore for ACI to offset. *See San Joaquin*, *supra*, 96 FCC 2d at 601-603; *accord Chase Communications Co.*, 100 FCC 2d 689, 692-693 (Rev. Bd. 1985). Moreover, insofar as ACI relies on programming purportedly tailored to different ethnic groups in its area including "French-language programming, and . . . programs focusing on the Greek, Hispanic, American Indian, and Black communities" (ACI Br. at 12), we cannot fault the ALJ here, any more than we could in *San Joaquin*, for expecting a *prima facie* showing that the allegedly superior programming

was demonstrably linked to the community's needs and interests. *Id.; Chapman Radio and Television Co.*, 7 FCC 2d 213, 214-215 (1967).

[6] We also summarily deny ACI's October 6, 1989 motion to reopen the record and remand against MacNeil. The motion, based on a newspaper report of MacNeil's recent decision to close her country store and sell her inventory, speculates without any support whatsoever that MacNeil's husband is now likely to work at the radio station. Not only is this surmise contrary to the record evidence, but MacNeil also reports in her declaration attached to her October 18, 1989 opposition to the motion that her husband is now engaged in a new business activity. Nor does ACI's motion raise any substantial questions as to MacNeil's testimony in this proceeding or her financial or other qualifications.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-352

In re Applications of

Eunice Wilder and Sheridan Broadcasting Corp. d/b/a WEYBURN BROADCASTING LIMITED PARTNERSHIP	File No. BPH-851213MN
WKIE-FM, INC.	File No. BPH-851216OA
GREATER RICHMOND RADIO, LTD.	File No. BPH-851216OH
BERTRAM BROADCASTING GROUP	File No. BPH-851216OM
BARBARA B. BENNS	File No. BPH-851216ON
JAMES RIVER COMMUNICATIONS CORPORATION	File No. BPH-851216OO
FUTURE BROADCAST LIMITED PARTNERSHIP	File No. BPH-851216OV
WITJO BROADCASTING, INC.	File No. BPH-851216OX
PENNY DRUCKER	File No. BPH-851216QB
VIRGINIA COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-851216QE

For Construction Permit for a
New FM Station on Channel 266A
in Richmond, Virginia

MEMORANDUM OPINION AND ORDER

Adopted: March 22, 1990; Released: March 30, 1990

By the Review Board: MARINO (Chairman) and ESBENSEN.

1. After full briefing and oral argument, the Review Board remanded this case for further hearing on financial and candor issues regarding James River Communications Corporation by *Memorandum Opinion and Order*, FCC 90R-13, released February 15, 1990. On March 12, 1990, James River filed a Motion for Leave to File Petition for Reconsideration, which was opposed by Weyburn Broadcasting Limited Partnership on March 15, 1990 and by WITJO Broadcasting Inc. and Barabara B. Benns on March 16, 1990. The Motion will be denied for the reasons set out below.

2. James River concedes that the Commission's rules bar requests for reconsideration of interlocutory actions such as our remand order. *See* 47 CFR §§ 1.102(b)(2), 1.106(a)(1), and 1.291(c)(3); *Alden Communications Corp.*, 103 FCC 2d 1, 2 (Rev. Bd. 1986). It maintains, however, that good cause exists for the grant of its motion for extraordinary relief because the remand order was based "upon representations that are demonstrably false." Motion, 2. Several of the competing applicants respond that the remand was based upon questions raised by past submissions of James River itself, and that it now attempts with new affidavits and pleadings to "correct the record while maintaining that the record should not be reopened." *WITJO*'s Opposition p. 2.

3. The relief sought here is not justified. After this matter was fully explored in the parties' briefs and at oral argument, and James River was given ample opportunity to respond to the conflicting contentions, substantial and material questions of fact remained regarding that applicant's basic qualifications. Its attempt to now resolve those questions with new affidavits and arguments generated after oral argument is inconsistent with the Congressional statutory scheme, 47 USC § 309, and past precedent. As the court observed in *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985):

> [T]he Commission may, and indeed must, weigh against the allegations of the petition the other evidence before it, including opposing affidavits filed pursuant to Section 309(d)(1). On the bases of *all* those materials it must decide whether the ultimate question of fact placed in issue . . . . is a "substantial" one-- *i.e.*, whether the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called . . . .

And as the court also observed in *Southwestern Operating Co. v. FCC*, 351 F.2d 834, 838 (D.C. Cir. 1965), Congress has prescribed a Section 309(e) trial-type hearing when "the accumulation of documentary representations and affidavits [reach] a dimension wherein the truth [is] becoming obscured, rather than revealed by the mounting pile of papers." *Compare Global Information Technologies, Inc.*, 5 FCC Rcd 535 (Rev. Bd. 1990) (additional information called for to eliminate ambiguities where the state of record does not indicate that material or substantial questions of fact exist).

4. ACCORDINGLY, IT IS ORDERED, That the Motion for Leave to File Petition for Reconsideration filed on March 12, 1990 by James River IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERITECH OPERATING COMPANIES	Transmittal Nos. 401, 417, and 423
Revisions to Tariff F.C.C. No. 2	

MEMORANDUM OPINION AND ORDER

Adopted: March 21, 1990; Released: March 21, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. The captioned transmittals revise the Ameritech Operating Companies' (Ameritech) tariff for Custom High Capacity Service, also known as DS3 service. The transmittals offer Fiber Hub Service and cross-connections at designated Fiber Hubs as special access service. Fiber Hub Service and cross-connections have been available in the past as specialized arrangements in Section 12 of Ameritech's access tariff.[1] Ameritech Tr. No. 401 Description and Justification (D&J) at 4. As such, these services were rated on an individual case basis (ICB). These transmittals would establish general rates for these services in order to comply with the Commission's recent *ICB Order*.[2]

2. Fiber Hub service would allow a customer to use DS1 or DS3 service to connect a customer designated premises (CDP) to a designated Fiber Hub where the service may be cross-connected to another service of the same speed. Alternatively, customers may multiplex a DS3 service to DS1s at the Fiber Hub and cross-connect the DS1s. The customer may also cross-connect to the service of another customer at the Fiber Hub. This is not permissible under Ameritech's currently effective tariff. *Id.* at 4-5.

3. Ameritech also introduces the concept of the "Fiber Hub Serving Area" in this filing. In these areas, Fiber Hub Service would be provisioned directly between the CDP and the Fiber Hub wire center. These services thus would not use the interoffice transport network to reach the Fiber Hub even if the Fiber Hub wire center is not the customer's normal serving wire center (SWC). As a result, Ameritech would not charge channel mileage for the interoffice portion of the service. Any additional channel mileage required by the customer (*i.e.*, from the Fiber Hub to a SWC outside the Fiber Hub Serving Area) would be measured from the Fiber Hub. *Id.* at 5-6. Although Ameritech's tariff indicates that it has fiber hubs in Illinois, Indiana, Ohio, and Wisconsin (but not in Michigan) it has only created Fiber Hub Serving Areas in Illinois.[3] Ameritech Tariff F.C.C. No. 2, Tr. No. 401, Section 7.4.10(B).

II. PLEADINGS

4. Three parties filed petitions against Ameritech's transmittal. Only one petitioner, Metropolitan Fiber Systems (MFS), addresses the Fiber Hub portion of Transmittal No. 401.

A. MFS Petition

5. MFS seeks suspension and investigation because the tariff would allow customers in limited geographic areas to escape payment of interoffice mileage charges for DS3 services that cross wire center boundaries. According to MFS, customers in downtown Chicago (the area in which MFS provides competitive DS3 service) would avoid mileage charges of $1000 to $1150 per month on each interoffice DS3 circuit they order from Ameritech. MFS Petition at 6-7. MFS asserts that this is a disguised effort to introduce geographically deaveraged special access rates. MFS analogizes Fiber Hub service to the "area specific rate sturcture" for DS1 LDCs that Ameritech proposed to implement in Ameritech Transmittal No. 287.[4] *Id.* at 7-8.

6. MFS argues that Ameritech cannot justify discriminatory rates on the basis of its own network configuration decisions. Thus, MFS concludes, the fact that Ameritech has chosen to route the proposed Fiber Hub service so as to exclude interoffice transport does not justify charging different rates to customers that receive functionally like services. According to MFS, a customer ordering DS3 service in a wire center that is part of the proposed Fiber Hub serving area could select from two options for providing functionally identical service, one of which (Fiber Hub service with a DS3 cross-connect) would be substantially cheaper than the other. This option is not available to customers located outside of the Fiber Hub serving area. *Id.* at 9-10.[5]

7. MFS also argues that the pending transmittal is anti-competitive. According to MFS, Ameritech is seeking to use unreasonably discriminatory rates to bind customers to long-term commitments. MFS contends that Ameritech would require these customers to pay increased rates if, after investigation, the pending rates are held unlawful or would require them to pay high termination charges if the customers choose to discontinue Ameritech service altogether. *Id.* at 11-13.

B. Ameritech Opposition

8. In reply, Ameritech asserts that Fiber Hub service is lawful and provides customers with new options for ordering and billing service. Ameritech Opposition at 11.[6] Ameritech contends that it is able to offer direct loops from the Fiber Hub office to all locations in the Fiber Hub Serving Areas because of the density of fiber facilities in these areas. This saves the cost of traversing two wire centers which includes the use of multiplexing equipment between the wire centers and the higher speed (*i.e.*, 565 Mbps or 1.12 Gbps) interoffice transport network. *Id.* at 11-12.[7]

9. Ameritech also argues that the Fiber Hub service rates are not discriminatory because the service is generally available to all customers in the Fiber Hub Serving Area. Ameritech states further that it intends to implement the Fiber Hub Serving Area concept wherever this is economically feasible. *Id.* at 13. Ameritech claims that Fiber Hub service provides new alternatives to customers and the proposed rates recognize the cost differences. *Id.*

at 13-14.[8] Ameritech concludes that neither the Communications Act nor the *ICB Order* prohibits Ameritech from tariffing a rate for Fiber Hub service that differs from its generally available DS3 rate. *Id.* at 14.

III. DISCUSSION

10. We need not address the question whether Fiber Hub DS3 service and "conventional" DS3 service are like for purposes of the prohibition against discrimination contained in Section 202(a) of the Communications Act, 47 U.S.C. § 202(a). We find that Ameritech has failed adequately to support its rates for Fiber Hub service under Section 61.38 of the Rules, 47 C.F.R. § 61.38, and therefore we reject the filing as patently unlawful.

11. Ameritech argues that Fiber Hub service is less costly to provision because it does not use the interoffice transport network. In addition, however, Ameritech contends that Fiber Hub service provides features and functions not available with "conventional" DS3 service. For example, Ameritech states that Fiber Hub service is provisioned more rapidly than DS3 service and that it provides greater flexibility in service reconfiguration than DS3 service. Notwithstanding these assertions, however, the Description and Justification for Transmittal 401 provides absolutely no cost support information for Fiber Hub service. Thus, we are unable to determine what costs, if any, may properly be considered to be saved by Ameritech's decision to route Fiber Hub service differently than conventional DS3 service. Moreover, although Ameritech suggests that Fiber Hub service provides greater functionalities than conventional DS3 service, it is priced lower than DS3 service. There certainly must be costs associated with these additional features. Ameritech does not explain, however, how it would recover these costs or even identify what the level of costs is likely to be.

12. Carriers are obligated to charge just, reasonable, and non-discriminatory rates for their services. *See* Section 201(b) and 202(a) of the Communications Act, 47 U.S.C. §§ 201(b), 202(a). The provisions of Section 61.38 of the Commission's Rules are one of the principal tools employed by the Commission to measure carrier compliance with these statutory requirements. We have been unable in this instance to measure Ameritech's compliance with its statutory obligations due to Ameritech's failure to provide any factual basis for its proposed rate levels. As we have noted, in lieu of concrete data Ameritech has made broad claims about cost savings. At the same time, Ameritech has failed to assign any costs whatsoever to the additional functionalities of Fiber Hub service which Ameritech claims make the service different from "conventional" DS3 service. We therefore conclude that Ameritech has failed to comply with the cost support requirements of the Commission's Rules and we reject the pending tariff revisions as patently unlawful.

IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that pursuant to Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), Ameritech Tariff F.C.C. No. 2, Nos. 401, 417, and 423 ARE REJECTED.

14. IT IS FURTHER ORDERED that the petition to suspend and investigate filed by Metropolitan Fiber Systems, Inc., IS DENIED.

15. IT IS FURTHER ORDERED that Ameritech SHALL ISSUE revisions to its tariff no later than five business days from the release of this Order removing the rejected material and reinstating currently effective material. These revisions shall be scheduled to become effective on not less than one day's notice.

16. IT IS FURTHER ORDERED that Special Permission No. 90-306 is assigned and Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, are waived for the purpose of issuing the above revisions.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Ameritech also proposed general rates for its DS3 Local Distribution Channels (or channel terminations) for the first time under Transmittal No. 401. This portion of the filing became effective subject to investigation. *See* Ameritech Operating Companies, Tr. No. 401, DA 90-134, released Feb. 2, 1990. Transmittal Nos. 417 and 423 defer the effective date of the pending tariff revisions.

[2] Local Exchange Carriers Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, 4 FCC Rcd 8634 (1989) (*ICB Order), recon. pending.*

[3] Two of these serving areas are in Chicago. They encompass six SWCs in the Chicago Loop and they overlap one another completely. In other words, each of the Fiber Hubs, which are located at the Franklin and Wabash offices, serves as an optional alternative SWC to the other Fiber Hub and to four other offices. The third Fiber Hub in Illinois is located in Springfield and serves as an alternative SWC for one other office.

[4] Transmittal 287 would have charged approximately 25 percent less for DS1 local distribution channels that were provisioned out of particular central offices than the rate generally available elsewhere in a state. Ameritech filed a petition for waiver of Section 69.3(e)(7) of the Commission's Rules, 47 C.F.R. § 69.3(e)(7), to allow it to implement that transmittal. MFS has appended a copy of the petition that it filed against Transmittal 287 to its petition concerning the instant filing. Ameritech later withdrew the relevant portion of Transmittal 287.

[5] MFS also contends that the proposed Fiber Hub service discriminates against customers within the Fiber Hub serving area who choose to connect their DS3 service to services below DS1 (*i.e.*, voice grade). *Id.* at 10.

[6] Ameritech notes that Fiber Hub service allows customers to cross-connect to another circuit which transmits traffic to the terminating location "without traversing multiplexing equipment." Ameritech Opposition at 11. This functionality enables one customer to cross connect to another customer's circuits at the Fiber Hub. *Id.*

[7] Ameritech states that these costs are typically recovered through the channel mileage termination charge, which amounts to approximately $827.85 per month in Illinois. *Id.* at 12 n.27.

[8] Indeed, Ameritech notes, the *ICB Order* states that carriers may develop more than one generally available DS3 service option. *Id.* at 14 (citing *ICB Order* at para. 84). Moreover, the Order notes that, "[t]o the extent particular types of circuits do, in fact, possess unique characteristics, carriers have the option of tariffing additional charges to account for these peculiarities." *Id. (citing ICB Order* at para. 86).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Extension of filing date
for Annual Report Form M

ORDER

Adopted: March 22, 1990; Released: March 23, 1990

By the Chief, Common Carrier Bureau:

1. Under the authority of Sections 201-205, and 219 of the Communications Act of 1934, as amended, and Sections 1.785 and 43.21 of the Commission's Rules, telephone companies operating telephone exchanges and having annual operating revenues in excess of $100 million are required to file the Annual Report Form M with the Commission within three months after the close of the calendar year. On March 13, 1990, on behalf of the local exchange carriers, the United States Telephone Association (USTA) requested an extension of the filing date for the 1989 reports from March 31, 1990 until April 16, 1990.

2. USTA notes that the 1988 Annual Report Form M due July 14, 1989 was the first report filed in the new Part 32 format. Subsequent to that submission, a series of Errata and letters have been issued in order to clarify Form M reporting requirements. Most recently, on February 12, 1990, an Order, DA 90-202, was released correcting typographical and format errors in the Annual Report Form M. The actual Form M schedules and instruction booklets were released the week of February 19, 1990.

3. The most recent changes to Form M, described in detail in USTA's request, were not substantial, but reflected only minor changes and formatting clarifications. Nevertheless, because of these changes the forms were distributed later than usual and the carriers have less time than usual to complete the forms. In this case, granting an extension would not create excessive delay in our processing the information from the Form M. Preliminary analysis will be conducted on Tables I and II of the ARMIS USOA Report which will be filed by these same telephone companies on April 2, 1990. These tables become the Balance Sheet and Income Statement Accounts of the Annual Report Form M and will serve for our initial analysis.

4. Accordingly, pursuant to Sections 0.91(a), 0.291 and 1.3 of the Commission's Rules, an extension of the filing date for the 1989 Annual Report Form M to April 16, 1990 IS GRANTED for all telephone carriers.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Extension of Filing Date
for Annual Reports
Form O and Form R

ORDER

Adopted: March 22, 1990; Released: March 23, 1990

By the Chief, Common Carrier Bureau:

1. Pursuant to Sections 1.785 and 43.21 of the Commission's Rules, wire-telegraph, ocean-cable and radiotelegraph carriers having annual operating revenues in excess of $50,000 are required to file annual reports with the Commission not later than March 31 of each year, covering the preceding calendar year. The Annual Report Form O is required from wire-telegraph and ocean-cable carriers,[1] and the Annual Report Form R is required from radiotelegraph carriers.[2]

2. The Bureau has received a number of requests for extensions of the filing date for the 1989 submissions. In addition, Western Union Corporation has filed a related petition requesting a waiver of certain Form O reporting requirements claiming the requirements are outdated, unnecessary and unduly burdensome. The comment period on Western Union's petition is still open and we intend to address their concerns in the near future.

3. We conclude that a 30-day extension of the filing deadline for Form O and Form R is warranted in this instance. Granting such an extension increases the opportunity for the 1989 submissions to be in accordance with any Commission action arising from Western Union's related petition. Furthermore, such an extension would not create excessive delay in our processing the information from the Form O and Form R.

4. Accordingly, pursuant to Sections 0.91(a), 0.291 and 1.3 of the Commission's Rules, an extension of the filing date for the 1989 Form O and Form R to April 30, 1990 IS GRANTED for all wire-telegraph, ocean-cable and radiotelegraph carriers.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Carriers that reported on Form O for 1988 were FTC Communications, Inc.; Western-Union International, Inc.; and Western Union Corporation.

[2] Carriers that reported on Form R for 1988 were RCA Global Communications, Inc.; TRT Telecommunications Corporation; and U.S. Liberia Radio Corporation.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-339

In the Matter of

Establishment of a Program
to Monitor the Impact of
Joint Board Decisions

ORDER

Adopted: March 23, 1990; Released: March 23, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On December 26, 1989, the Commission released a *Memorandum Opinion and Order* prescribing the report form and guidelines that would permit it to monitor jurisdictional shifts in revenue requirement that may have resulted from the simplification of the Commission's Part 36[1] separations rules and the conformance of those rules to the revised accounting rules.[2] That order required all Tier 1 carriers (and permitted other carriers) that experienced 1988 jurisdictional revenue requirement shifts of 5 percent or greater resulting from the adoption of the Part 36 revised Separations Manual to file the report form contained in Appendix A of the order. The Commission delegated authority to the Common Carrier Bureau to determine, after reviewing the reports containing the 1988 data, whether similar reports for 1989 data are necessary. For the reasons discussed below the Bureau has determined that a report containing 1989 data is unnecessary.

II. BACKGROUND

2. In the *Separations Report and Order* adopting the Part 36 revised Separations Manual, the Commission also adopted the Docket 86-297 Joint Board's recommendations that a program be established to monitor the jurisdictional revenue requirement impact resulting from implementation of the Part 36 revised Separations Manual and that this program be included in the Docket 80-286 monitoring program.[3] In the *Monitoring Recommended Decision and Order* released May 28, 1987, the Docket 80-286 Joint Board set forth its recommendations for a monitoring program and stated that the Commission should require LECs to report annually for two years any jurisdictional shift in total revenue requirement that is 5 percent or more of the annual total revenue requirement for a study area.[4] In that order the Joint Board stated that it was interested in identifying the revenue requirement impact resulting from conformance and simplification of the separations rules and that the LECs' reports should exclude any revenue requirement shifts resulting from implementation of the separations changes adopted in the Docket 80-286 proceeding. The Joint Board also stated that LECs should report 1988 revenue requirement shifts in March 1989 and 1989 revenue requirement shifts in March 1990. The Chief of the Common Carrier Bureau (Bureau) subsequently granted USTA's request to extend the date for filing 1988 data from March 1, 1989, to May 1, 1989.[5] On April 4, 1989, the Bureau granted USTA a further extension of time from May 1, 1989, until thirty days after the release date of the jurisdictional revenue requirement monitoring report form and guidelines.[6]

3. In the *Memorandum Opinion and Order*, the Commission required that Tier 1[7] carriers which experienced jurisdictional shifts of 5 percent or greater in calendar year 1988 resulting from the adoption of the Part 36 revised Separations Manual to report those shifts within thirty days from the release of the order. Appendix A to the *Memorandum Opinion and Order* contained the Conformance Report Data Request report form and the guidelines to be used in completing the report. Also in that order, the Commission provided that other carriers experiencing jurisdictional revenue requirement shifts of 5 percent or greater may file reports on an optional basis using the prescribed report form. Finally, the Commission delegated authority to the Common Carrier Bureau to determine, after reviewing the reports containing 1988 data, whether reports for 1989 data are necessary to evaluate further the impact of the revised separations manual.[8]

III. DISCUSSION

4. The reports for calendar year 1988 data required by the *Memorandum Opinion and Order* were filed on January 25, 1990. After reviewing the reports for 1988, we conclude that a monitoring report concerning the impact of the new Part 36 Separations Rules on 1989 revenue requirements is unnecessary. Only one carrier filed data concerning the impact of the revised separations manual on 1988 revenue requirements,[9] and the impact for each of its study areas was well below five percent. Moreover, the Commission has not adopted any major changes to either its Part 32 accounting rules or its Part 36 separations rules that would lead us to believe that the impact of the new Part 36 rules would be more significant for 1989 than the impact reported for 1988. Consequently, we conclude that the public interest is best served by eliminating the 1989 report.

IV. ORDERING CLAUSE

5. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), and §0.291 of the Commission's Rules, 47 C.F.R. §0.291, That the reporting requirements imposed on Tier 1 carriers for monitoring jurisdictional shifts in revenue requirement that may have resulted from the simplification of the separations rules and conformance of those rules to the revised accounting rules ARE DISCONTINUED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] 47 C.F.R. §36.

[2] Establishment of a Program to Monitor the Impact of Joint Board Decisions, CC Docket No. 87-339, 4 FCC Rcd 8766 (1989) (*Memorandum Opinion and Order).*

[3] Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72, 80-286 and 86-297, 2 FCC Rcd 2639 (1987) (*Separations Report and Order), recon. granted in part*, 2 FCC Rcd 5349 (1987), *recon. granted in part*, 3 FCC Rcd 5518 (1988).

[4] MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, and Establishment of a Program to Monitor the Impact of Joint Board Decisions, CC Docket Nos. 78-72 and 80-286, 2 FCC Rcd 3298 (1987) (*Monitoring Recommended Decision and Order), adopted*, Establishment of a Program to Monitor the Impact of Joint Board Decisions, CC Docket No. 87-339, 2 FCC Rcd 5266 (1987) (*Monitoring Order), recon. granted in part*, Establishment of a Program to Monitor the Impact of Joint Board Decisions, CC Docket No. 87-339, 4 FCC Rcd 7660 (1989) *(Order on Reconsideration).*

[5] Establishment of a Program to Monitor the Impact of Joint Board Decisions, CC Docket No. 87-339, 4 FCC Rcd 1405 (Com. Car. Bur. 1989).

[6] Establishment of a Program to Monitor the Impact of Joint Board Decisions, CC Docket No. 87-339, 4 FCC Rcd 3459 (Com. Car. Bur. 1989).

[7] Tier 1 carriers are carriers with $100 million or more in total company annual revenues. The initial classification of a company is determined by its lowest annual operating revenues for the five immediately preceding years. Subsequent changes in classification must be made when annual operating revenues show a greater or lesser classification for five consecutive years. Commission Requirements for Cost Support Material to be Filed with 1989 Annual Access Tariffs, 4 FCC Rcd 1662, 1663 and n. 18 (1988).

[8] *Memorandum Opinion and Order*, 4 FCC Rcd at 8770.

[9] The Ameritech Operating Companies filed a report showing the following jurisdictional revenue requirement shifts:

Illinois Bell	1.39% shift to Interstate
Indiana Bell	.04% shift to State
Michigan Bell	.34% shift to State
Ohio Bell	1.28% shift to Interstate
Wisconsin Bell	.22% shift to State.

Lincoln Telephone and Telegraph Company and Rochester Telephone Corporation filed letters indicating that their jurisdictional revenue requirement shifts were less than five percent.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 15, 1990

AMERICAN RADIO RELAY LEAGUE (ARRL) REQUESTS FEDERAL PREEMPTION OF STATE LAWS CONCERNING AMATEUR TRANSCEIVERS CAPABLE OF RECEIVING LAW ENFORCEMENT AND OTHER SIGNALS

COMMENTS REQUESTED

On November 13, 1989, the American Radio Relay League, Incorporated (ARRL) filed a *Request for Issuance of Declaratory Ruling* requesting that the Commission preempt, on the basis of federal jurisdiction, certain state statutes and local ordinances affecting transceivers used by amateur service operators. In its request, the ARRL cites various statutes and ordinances, many directed toward radio reception within automobiles, that have the effect of prohibiting ownership of amateur station transceivers that are capable of reception on frequencies used for law enforcement and other public safety activities. The ARRL states that, to facilitate adequate reception of the end frequencies of amateur service frequency bands, the receivers of commercially available amateur station transceivers typically overlap the ends of the amateur service bands. The ARRL views this additional reception as technically justifiable and as merely incidental to authorized amateur service frequency band reception. The ARRL seeks a Commission declaratory ruling preempting the statutes and ordinances in question.

The Private Radio Bureau seeks comment on this issue. To file comments, please file an original and two copies at the following address: Chief, Special Services Division, Federal Communications Commission, 2025 M Street, N.W., Room 5322, Washington, D.C. 20554. Comments should be filed by **May 16, 1990.** Reply Comments should be filed by **May 31, 1990.** Comments and reply comments should refer to: ARRL Declaratory Ruling Request.

Copies of the ARRL's *Request for Issuance of Declaratory Ruling*, as well as any documents filed in this matter, may be obtained from the Commission's copy contractor, International Transcription Services, Inc., at the following address and telephone number: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. These documents may also be inspected at Room 5322, noted above.

For further information, please contact Eric Malinen at (202) 632-7175.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, NORTHWESTERN BELL TELEPHONE COMPANY, AND PACIFIC NORTHWEST BELL TELEPHONE COMPANY — File No. ENF-90-01

Application for authority, pursuant to Section 221(a) of the Communications Act, to Consolidate.

MEMORANDUM OPINION AND ORDER

Adopted: March 26, 1990; Released: March 29, 1990

By the Chief, Common Carrier Bureau:

1. On October 2, 1989, The Mountain States Telephone and Telegraph Company (MTN), Northwestern Bell Telephone Company (NWB) and Pacific Northwest Bell Telephone Company (PNB) (collectively Applicants or the US West telephone companies) applied for authority to consolidate into a single entity.[1] For the reasons discussed herein, we conclude that the proposed consolidation will benefit their customers and is otherwise in the public interest.[2]

2. Applicants are telecommunication common carriers fully subject to the Communications Act (the Act) and have operated on a consolidated basis since July 1988. They seek to merge NWB and PNB into MTN, with MTN as the surviving corporation.[3] The name of the resulting company would be changed to US West Communications, Inc. Applicants state that no consideration is being paid by or to any applicant and that the proposed transaction involves no issuance of new stock or change in Applicants' total capitalization.[4] Applicants state further that there will be no change of the terms and conditions of employment or of the pension and benefit plans for any employees of their companies as a result of the consolidation.[5]

3. Applicants state that savings have been achieved by operating their companies on a consolidated basis since July 1988, and that a corporate consolidation will allow them to achieve further savings, make for greater efficiency of operation, provide a firmer basis for financing the continued expansion of telephone service in the areas served, and thus benefit their telephone subscribers.[6] Applicants further state that there will be no adverse effect on service and that service of all three companies should be improved as a result of the proposed consolidation.[7]

DISCUSSION

4. Section 221(a) of the Act provides, *inter alia*, that if the Commission finds that a ". . . proposed consolidation, acquisition or control will be of advantage to the persons to whom service is to be rendered and in the public interest, it shall certify to that effect; and thereupon any Act or Acts of Congress making the proposed transaction unlawful shall not apply . . . ."[8] Thus, certification provides for immunity against federal statutes such as the antitrust laws which might, in the absence of such certification, hold the acquisition unlawful.[9] Section 221(a) also provides, in pertinent part, that: "Nothing in this subsection shall be construed as in anywise limiting or restricting the powers of the several States to control and regulate telephone companies." In this connection, we note that Applicants have filed for approval of the regulatory authorities of the States of Iowa, Nebraska, North Dakota, Oregon and Washington.[10] As of this date, Iowa, Nebraska and North Dakota have approved the proposed reorganization[11] and action on the applications before other regulatory authorities is pending.

5. We note that no comments have been received opposing the proposed consolidation, although this fact, of course, does not relieve us of the necessity of undertaking the required statutory analysis. The Commission's policy has long been that ". . . where the need of the public for efficient and economical service has been demonstrated, pursuant to Section 221(a), the general public policy against the fostering of monopolies is not an impediment to [an acquisition] . . . in the absence of any other significant public interest considerations. Otherwise, Section 221(a) would be of little or no practical utility."[12]

6. We perceive no anticompetitive or antitrust consequences as the result of the proposed consolidation. The facilities of each of the Applicants are not parallel or competitive with the facilities of either other applicant. We note that the transaction is exempt from filing requirements under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 as an "intraperson transaction" within the meaning of the Federal Trade Commission's regulations implementing that statute.[13] MTN, the acquiring company, as well as NWB and PNB, the other US West telephone companies to be merged with it, all are wholly-owned indirect subsidiaries of US West, Inc. and have been operated on a consolidated basis for more than a year. The proposed corporate consolidation thus would give formal structure to operations of the US West telephone companies which already have been and currently are transpiring in substantial measure on a de facto consolidated basis. We agree with Applicants that the integration of their companies with the resulting simplification of corporate structure will make for greater efficiency of operation, should result in improved service to subscribers to their services, and is in the public interest.

CONCLUSION

7. The record before us indicates that the proposed merger will benefit the public in the affected exchanges and will otherwise promote the public interest pursuant to the public interest standard set out in 47 U.S.C. § 221(a). Therefore, we conclude that the US West telephone companies' Application for consent to consolidate should be granted.[14]

CERTIFICATION AND ORDERING CLAUSES

8. In light of the foregoing and upon consideration of the entire record of this proceeding, IT IS CERTIFIED that the proposed consolidation of The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company will be of advantage to the persons to whom service is to be rendered and in the public interest.

9. Accordingly, IT IS ORDERED, pursuant to authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Application of The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company for authority pursuant to 47 U.S.C. § 221(a) to consolidate IS GRANTED.

10. IT IS FURTHER ORDERED that this Memorandum Opinion and Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Applicants are wholly-owned by US West Communications Group, Inc., which is wholly-owned by US West, Inc.

[2] A copy of the application was served on the governor and state regulatory commission of each of the states in which the affected physical property of Applicants is situated. By Public Notice released October 20, 1989, 4 FCC Rcd 7598 (1989), the Commission solicited the filing of comments by November 20, 1989 on the proposed transaction. No comments were received in response to such notice.

[3] NWB and PNB are organized under the laws of the states of Iowa and Washington, respectively. MTN is a Colorado corporation.

[4] Application at 2, 3.

[5] *Id.* at 5.

[6] *Id.*

[7] *Id.*

[8] 47 U.S.C. § 221(a).

[9] Hughes Industries, Inc., 4 FCC Rcd 7876 (1989); Wisconsin Telephone Co., 27 FCC 1, 18 (1959).

[10] Application at 4, 5. Applicants have asked the Arizona Corporate Commission to decline jurisdiction over the transaction. As previously noted, a copy of the Application has been served on the regulatory commission of each state in which the affected physical assets of Applicants are situated. These are Colorado, Idaho, Minnesota, Montana, New Mexico, South Dakota, Utah and Wyoming, in addition to Arizona and the five states specified above.

[11] Northwestern Bell Telephone Co., No. SPU-89-18 (Utilities Div., Iowa State Utilities Board, Dec. 28, 1989); Northwestern Bell Telephone Co., Nebraska Public Service Commission Order (Jan. 31, 1990); Northwestern Bell Telephone Co., No. PU-415-89-421, North Dakota Public Service Commission Order (Jan. 30, 1990).

[12] Hughes Industries, Inc., *supra*, 4 FCC Rcd at 7878, *quoting* Southwestern Bell Telephone Co., 1 FCC 2d 1420, 1438 (1965) (citations omitted).

[13] *See* 16 C.F.R. § 802.30 at example 1.

[14] It is understood that the consolidation authorized herein shall be effected only following receipt by Applicants of all prerequisite approvals of state regulatory authorities.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 90-7

In the Matter of

Washington, D.C. Metropolitan
Area Regional Public Safety Plan

ORDER

Adopted: March 26, 1990; Released: March 30, 1990

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On November 15, 1989, the Washington, D.C. Metropolitan Area (Region 20) submitted its public safety plan to the Commission for review. Region 20 is comprised of the State of Maryland, Washington, D.C., and Northern Virginia, including Arlington, Fairfax, Fauquier, Loudoun, Prince William and Stafford counties and Alexandria, Fairfax, Falls Church, Manassas and Manassas Park cities. The plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in its region.

2. The Region 20 plan was placed on Public Notice for comments on January 25, 1990, 55 FR 2407 (Jan. 24, 1990). The Commission received one comment in this proceeding, from the Baltimore Regional Council of Governments, supporting the Region 20 Plan and urging the Bureaus to accept it.

3. We have reviewed the plan submitted for Region 20 and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in the Washington, D.C. Metropolitan Area.

4. Accordingly, IT IS ORDERED that the Public Safety Radio Plan for Region 20 IS ACCEPTED. Furthermore, licensing of the 821-824/866-869 MHz band in Region 20 may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Editorial Amendments to
the Aviation Services
Rules (Part 87)

ERRATUM

Released: March 30, 1990

1. The order in the above captioned proceeding, DA 90-186, released February 21, 1990, IS CORRECTED by deleting the last sentence of Footnote 5 of Section 87.137(a) of the Commission's Rules, 47 C.F.R. § 87.137(a), to read:

§ 87.137 Types of emission.

* * * * *

NOTES:

* * * * *

[5] This emission may be authorized for audio frequency shift keying and phase shift keying for digital data links on any frequency listed in § 87.263(a)(1) or § 87.263(a)(3). 13K0A2D emission may be authorized on frequencies not used for voice communications. If the channel is used for voice communications, 13K0A9W emission may be authorized, provided the data is multiplexed on the voice carrier without derogating voice communications.

* * * * *

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-236

In re Applications of

Fenwick Island Broadcast Corporation & Leonard P. Berger d/b/a FENWICK ISLAND BROADCAST LIMITED PARTNERSHIP I	File No. BPH-850712ZD
FENWICK ISLAND COMMUNICATIONS, INC.	File No. BPH-850712ZE
GLORIA J. FERNANDEZ-PEREYO MERRYMAN	File No. BPH-850712ZI

For Construction Permit for a New
FM Broadcast Station on Channel 221A
at Fenwick Island, Delaware

MEMORANDUM OPINION AND ORDER

Adopted: March 14, 1990; Released: April 2, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. In *Fenwick Island Broadcast Limited Partnership I*, 4 FCC Rcd 8803, 8804-8805 (Rev. Bd. 1989), the Board found three specific legal obstacles to its approval of a then-pending settlement agreement. After consulting with the Mass Media Bureau, the parties negotiated a new agreement, and on March 5, 1990 filed a new Joint Request for Approval of Settlement Agreement. The Bureau filed comments supporting the Joint Request on March 9, 1990. We will grant the Joint Request which establishes that the parties have eliminated the previously identified obstacles, have negotiated a new agreement which is consistent with controlling Commission precedent, and have made the showing required by the Commission's rules, 47 CFR §73.3525(a).

2. Fenwick Island Broadcast Limited Partnership I, and Fenwick Island Communications, Inc. have again agreed to dismiss their applications in return for monetary consideration. Gloria J. Fernandez-Pereyo Merryman (Merryman), who prevailed in the *Initial Decision* below, has agreed to submit a proposed amendment to her application (*see* Joint Request, Attachment B), which provides that a new entity, Collins Broadcasting Systems, Inc., is to be granted the construction permit. However, in this agreement, Merryman retains a controlling 51% voting interest, and the remaining 49% interest would be held by William L. Collins, III and Michael J. Scanlon, Jr., new participants in this case. *See* 4 FCC Rcd at 8803 para. 3. As the Bureau notes, the agreement "further contains provisions, at para. 6-7, which contemplate, but do not require, either the future transfer of Merryman's interest in Collins Broadcasting Systems, Inc. to Collins/Scanlon or their interest to her." Bureau's Comments at para. 3. Collins Broadcasting has also now been granted an option to acquire Merryman's transmitter site. Agreement, para. 18.

3. As required by Section 73.3525 the parties have filed declarations that "no consideration not reflected in the Settlement Agreement has been promised or received" and that none of the original applications were "filed for the purpose of reaching or carrying out any settlement agreement . . . " Joint Request at para. 7, and Attachment C. The parties also urge that: "the FCC encourages settlement of contested proceedings among mutually exclusive applicants in order to allow the initiation of broadcast service to the public at the earliest possible date, to conserve the FCC's administrative resources, and to conserve the parties' financial resources that might otherwise be expended in furtherance of the public interest". Agreement, p. 1-2.

4. At the outset we note that, first, the present agreement does not propose to transfer a controlling interest to the new participants and therefore does not conflict with our previous ruling (4 FCC Rcd at 8804 para. 8), or the Commission's subsequent decision in *Rebecca Radio of Marco*, FCC 90-67, released February 20, 1990. Second, the applicants have not renewed their request for declaratory relief which we found to be inconsistent with past Commission practice. *See* 4 FCC Rcd at 8804 para. 11. Third, a firm "option" to acquire Merryman's transmitter site has been substituted in place of the inchoate "right of first negotiation", *see* 4 FCC Rcd at 8805 para. 12. This eliminates the last obstacle to our approval of the earlier agreement.

5. As previously noted, the Bureau, which objected to the earlier agreement, has filed comments in support of the present agreement. Our own independent review of the submissions confirms the accuracy of the Bureau's following legal analysis (which we therefore adopt):

> The Joint Request and supporting materials satisfy the requirements of Sections 73.3525(a)(1) and (a)(2) of the Commission's Rules, which implement Section 311(c)(3) of the Communications Act of 1934, as amended. Specifically, each applicant has established that approval of the settlement agreement would serve the public interest, and that none of the applications was filed for an improper purpose. Moreover, any [future] transaction between Collins/Scanlon and Merryman which involved a transfer of control would require prior Commission approval under §310 of the Communications Act of 1934, as amended. Finally, the arrangement contemplated in the Joint Request and Merryman's amendment is consistent with that approved by the Commission in *Evergreen Broadcasting Company*, 4 FCC Rcd 8224 (1989) and by the Review Board in *Tequesta Television, Inc.*, 2 FCC Rcd 7324 (Rev. Bd. 1987).

6. ACCORDINGLY, IT IS ORDERED, That the Motion to Accept Settlement Agreement Out of Time filed February 16, 1990 and the Motion to Accept Executed

Settlement Agreement filed February 26, 1990 by Collins Broadcasting Systems, Inc. ARE GRANTED; that the Joint Request for Approval of Settlement Agreement filed March 5, 1990, IS GRANTED and the settlement agreement IS APPROVED; that the applications of Fenwick Island Broadcast Limited Partnership I (File No. BPH-850712ZD) and Fenwick Island Communications, Inc. (File No. BPH-850712ZE) ARE DISMISSED with prejudice; that Merryman's amendment to her application, Attachment B to the Joint Request, to substitute Collins Broadcasting Systems, Inc. as the applicant IS ACCEPTED; that the application of Collins Broadcasting Systems, Inc. (File No. BPH-850712ZI) IS GRANTED; that the petitions for leave to amend filed March 10, July 10, and November 3, 1989 and the motion to correct hearing transcript filed February 2, 1989 by Fenwick Island Communications, Inc., and the exceptions of the parties, ARE DISMISSED; and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 23, 1989

PROCEDURES FOR 1990 ANNUAL ACCESS CHARGE TARIFFS TO BE FILED ON OR BEFORE APRIL 2, 1990

Local exchange carriers (LECs) are required by Part 69 of the Commission's Rules, 47 C.F.R. Part 69, to file new access charge tariffs or revisions to existing tariffs to be effective July 1, 1990[1] on not less than 90 days' notice. Therefore, we anticipate receiving these filings on or before April 2, 1990. In this Public Notice, we provide details on the specific procedures to be followed when submitting these filings to the Commission.

GENERAL

Interested parties are reminded that these filings and the associated review and analysis are *not* part of a docketed proceeding. Therefore, until further notice, all correspondence and pleadings (other than tariff filings) in connection with these filings should *not* bear any docket number but must instead bear the designation "*1990 ANNUAL ACCESS CHARGE TARIFF FILINGS*." All such correspondence and pleadings must be submitted with an original and 10 copies. A copy must also be served on the Commission's Commercial Contractor, International Transcription Service, Inc., (ITS), Room 246, 1919 M Street, N.W.

TARIFF FILINGS

LECs submitting tariff filings should consult the attached schedule which details the number of copies required and the location to which those copies should be delivered. Carriers are especially reminded that (1) the tariff filing must be accompanied with the appropriate filing fee of $250, and (2) they must serve a copy on ITS. Those annual access filings submitted on April 2, 1990 must be delivered to ITS at the Commission in Room 535, 1919 M Street, N.W.

Carriers, whether filing their own individual tariffs or not, are reminded of the customer notification requirements as outlined in Section 61.58(a)(4) of the Commission's Rules, 47 C.F.R. § 61.58(a)(4), concerning rate increases in particular. Carriers are further reminded that the purpose of such notification is to afford any affected customer sufficient opportunity to comment on the tariff filing within the time period established for filing petitions in Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773.

In an effort to facilitate identification and cataloging of the tariff filings, the LECs should:

1. Clearly label any package of revised tariff pages as such, *e.g.*: BELL ATLANTIC, STATE, TRANS. LTR. XXX, DATE, REVISED TARIFF PAGES. These revised pages or any completely new tariff should *not* be submitted in a binder but should be hole-punched for a 3-ring loose leaf binder.

2. Provide a list identifying all cost support volumes submitted with these revisions and associate the list with the cost volumes *and* the transmittal letter.

3. Clearly label all boxes containing cost support volumes as to their contents, *e.g.*: BELL ATLANTIC, STATE, TRANS. LTR #XXX, DATE, VOLS. 1, 2, 3, 4, BOX 1 OF 5.

4. Submit cost support material in a 3-ring binder pursuant to Public Notice dated December 13, 1986, DA 86-337, and label the volumes of cost support on the spine of the binder with the name of the carrier, the transmittal number, the subject of the filing, the volume number and the date of the filing. For example: BELL ATLANTIC, TRANS. LTR. #XXX, 1990 ANNUAL ACCESS TARIFF FILING, VOL. 2-2 OF 2, APR. 2, 1990.

5. Each carrier should submit its respective Tariff Review Plan and Certification in a separately bound package as required by the Order in the Matter of Commission Requirements for Cost Support Material To be Filed with 1990 Annual Access Tariffs, DA 90-274, released February 26, 1990.

6. In addition to the paper copies, each Tier 1, Tier 2A and Tier 2B company which files using a prospective test year must submit its Tariff Review Plan information in three copies on computer "floppy disks". This requirement does not apply to those carriers granted waivers in our Order In the Matter of Commission Requirements for Cost Support Material To Be Filed with 1990 Annual Access Tariffs, DA 90-419, released March 14, 1990. Carriers should follow the rules for submission of data to FCC on magnetic media contained in the 1989 Tariff Review Plan (TRP). Carriers should also follow the technical documentation from the 1989 TRP, appropriately updated, for all TRP charts except COS-1(H), COS-1(P), COS-6(P) and COS-7(P), for which the carriers should use the documentation for ARMIS reports 43-01 (for both COS-1(H) and COS-1(P)), 43-03, and 43-04, respectively. For filing charts COS-1(H), COS-1(P), COS-6(P) and COS-7(P), on diskettes, carriers should follow the instructions for ARMIS report 43-01, 43-03, and 43-04, respectively. As indicated in the Attachment to this Notice, one copy of the "floppy disks" should be filed with ITS at the time of filing the Access Tariffs. The second copy should be filed with Mark Uretsky, Tariff Review Branch in Room 514. The third copy should be filed with Barbara Van Hagen, Accounting and Audits Division, 2000 L St. N.W., Room 812.

PETITIONS AND REPLIES

Petitions concerning these tariffs will be due **April 27, 1990** regardless of whether the tariff revisions are submitted on or before April 2, 1990. Replies may be filed only by the publishing carriers and will be due on **May 14, 1990.** Petitioning parties should reference the general designation as outlined above or the specific tariff and transmittal number, and *not* a docket number. Petitions should be organized where possible so as to present comments in a modular form, section-by-section, for ease of analysis. An original and 10 copies of any petition or reply must be filed with the Commission and a copy must be served

simultaneously upon the publishing carrier or petitioner. Additionally, ITS must be served with a copy in RM 246, 1919 M Street, N.W.

Members of the general public may submit one copy of their comments, without regard to form, by letter to the Secretary. These comments should specify that they concern the 1990 Annual Access Tariff Filings or a specific tariff transmittal.

PUBLIC INFORMATION

Tariffs filed with the Commission, related correspondence, petitions, and replies concerning the 1990 Annual Access Charge Tariff Filings may be examined by the public from 1:30-4:30 p.m., Monday through Friday, in RM 513, 1919 M Street, N.W., Washington, D.C.

Copies of tariffs, petitions, and other related filings may be obtained from the Commission's Commercial Contractor, ITS. Parties should contact Wilbur Thomas of ITS at (202) 875-3800.

For further information, contact: Judith A. Nitsche, Tariff Review Branch (632-5550)

FEDERAL COMMUNICATIONS COMMISSION

FOOTNOTE

[1] Those LECs which file access tariffs pursuant to Section 61.39 of the Commission's Rules, 47 C.F.R. § 61.39, may elect to make no filing.

ANNUAL 1990 ACCESS CHARGE TARIFF FILING

OFFICIAL COPIES	TRANS LETTER	REVISED TARIFF PAGES	Tariff Review Plan HARD COPY	Tariff Review Plan DISKETTE	61.38 COST SUPPORT VOL. 1 D&J ONLY	61.38 COST SUPPORT VOL. 1 D&J PLUS REMAINDER OF 61.38 MATERIAL
FEE SECTION ROOM L-18	1	2	-	-	-	-
PUBLIC REFERENCE ROOM---ROOM 513	1	1	-	-	-	-
ITS - ROOM 535 1919 M ST., N.W.	1	1	1	1	-	1
COURTESY COPIES						
JOHN CIMKO ROOM 518	1	-	-	-	1	-
DANIEL GROSH ROOM 518	1	1	-	-	1	-
PAT NAGLE ROOM 518	1	-	-	-	1	-
JUDY NITSCHE ROOM 514	1	1	-	-	1	-
MARK URETSKY ROOM 514	1	-	2	1	-	2
PEYTON WYNNS ROOM 538	-	-	1	-	-	-
Barbara Van Hagen ACCTG & AUDITS DIVISION 2000 L ST., N.W. ROOM 812	1	1	1	1	-	1

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

CITY OF STERLING,	CSR-3294
COLORADO	CO0027

Motion for Declaratory Ruling

MEMORANDUM OPINION AND ORDER

Adopted: March 26. 1990; Released: April 2, 1990

By the Chief, Mass Media Bureau:

INTRODUCTION

1. On October 18, 1989, the City of Sterling, Colorado (hereinafter "the City") filed a petition seeking a Commission ruling, pursuant to §76.33(a) of the Commission's Rules, that the City's franchised cable television system is not subject to effective competition. The City's petition is opposed by TCI Cablevision of Colorado, Inc. (hereinafter "TCI"), the City's franchisee. The City has replied, and has also moved to strike TCI's opposition.

2. On October 30, 1984, the Cable Communications Policy Act was signed into law.[1] This legislation set forth a national policy concerning cable communications, to encourage cable's growth and development, to establish guidelines for the regulation of cable systems, to promote competition in cable communications, and to minimize unnecessary regulation.[2] In the *Cable Communications Act Rules*, 58 RR 2d 1 (1985), *modified*, 104 FCC 2d 386 (1986), *aff'd in part and remanded in part sub nom. ACLU v. FCC*, 823 F. 2d 1554 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1220 (1988), *on remand*, 3 FCC Rcd 2617 (1988), the Commission adopted rules to implement provisions of the Cable Act. Among the rules adopted was §76.33, establishing standards for regulating cable television service rates. That rule states, in pertinent part:

> Only cable systems that are not subject to effective competition may be rate regulated. A cable system will be determined to be subject to effective competition whenever 100 percent of the cable community receives service from at least three unduplicated broadcast television signals. It is not necessary that the same three signals provide service to the entire community. Signals shall be counted on the basis of their predicted Grade B contour (as defined in §73.683 of the rules) or whether they are significantly viewed within the cable community, as defined in §76.54(b) and (c) of the rules. A signal that is significantly viewed shall be considered to be available to 100 percent of the cable community. A translator station authorized to serve the cable community is to be counted in the same manner as a full-service station, except that its coverage area shall be based on its protected contour as specified in §74.707 of the rules, provided that the translator is not used to retransmit a station already providing a Grade B contour or significantly viewed signal within the cable community.

47 C.F.R. §76.33(a)(2). Parties may challenge the availability of a signal, for purposes of this rule, through the Commission's special relief process. 47 C.F.R. §76.33(c). The rule applies to all cable systems as of October 29, 1988.

3. Television station contour maps on file with the Commission show that only one television broadcast station -- Station KTVS (CBS, Channel 3), Sterling, Colorado -- places a predicted Grade B contour over all of Sterling. Four translator stations -- Television Broadcast Translator Stations K23AB, K25AF, K27AG, and K29AC -- are all licensed to serve Sterling, Colorado, but their protected contours as specified in §74.707 of the Commission's Rules fail to encompass Sterling. On May 1, 1989, TCI increased its rates for basic cable service from $15.25 per month to $17.00 per month, and thereafter, on June 15, 1989, petitioned the Commission for a ruling that TCI *is* subject to effective competition in Sterling. The City filed a countervailing petition the following day. Both TCI and the City withdrew their petitions in August 1989. *See* TCI *Cablevision of Colorado, Inc.*, Cable Television Actions Report No. 3239, Mimeo No. 4406 (released September 12, 1989). The City now renews its petition.

SUMMARY OF PLEADINGS

4. In support of its petition, the City notes that Sterling is served with predicted Grade B service, pursuant to the guidelines and standards of §76.33 of the Rules, solely by Station KTVS. While Television Broadcast Translator Stations K23AB, K25AF, and K29AC are licensed to serve Sterling,[3] their protected contours do not reach Sterling's city limits. In addition, no signals have been deemed to be significantly viewed within Sterling. Accordingly, maintains the City, effective competition does not *prima facie* exist within Sterling, and it is TCI's burden to prove the contrary and to bear the costs of doing so. While TCI has submitted to the City a signal strength study prepared by TCI, purporting to establish that actual Grade B service from all three translator stations -- as well as KTVS -- exists within Sterling, the City argues that TCI's study is fatally flawed. The City submits copies of both TCI's study and an engineering analysis of the study prepared by the City's consulting engineer, which notes that the measurement points do not fall along an evenly spaced rectangular grid, nor did TCI include necessary topographic maps or data concerning measurements and procedures to permit an accurate appraisal of the study. Accordingly, argues the City, TCI has not established the presence of effective competition in Sterling, and TCI's rates are subject to regulation by the City pursuant to TCI's franchise agreement.

5. In opposition to the City, TCI states that it determined, through field strength measurements made by its employees, that three unduplicated signals provided Grade B service to all of Sterling and that therefore effective competition existed, allowing TCI to raise its rates. TCI reviews the history of §76.33 of the Rules, noting that translator stations authorized to serve a community are to be counted equally with full-power television stations in determining the presence of effective

competition. While conceding that the protected contours of the translators licensed to serve Sterling fail to encompass Sterling, TCI asserts that it is sufficient that the translators in question are authorized to serve Sterling for the translators to be counted in determining the presence of effective competition. Signal strength measurements, TCI maintains, merely confirm the signals' presence, obviating the need for a Commission ruling. In response to the City's criticisms of TCI's measurements, TCI submits a declaration from Jim Degenhardt, Division Engineer for TCI Central, Inc., who took the measurements, stating that the test points were chosen to cover Sterling's extremities as well as its interior portions, and giving identifying information for the test equipment.

6. The City moves to strike TCI's opposition, claiming that it is late filed. The City states that it filed its motion for a declaratory ruling pursuant to §1.2 of the Commission's Rules, and that oppositions were therefore due on or before October 30, 1989, pursuant to §1.45 of the Rules. TCI's opposition was filed on November 17, 1989, as though the City's motion were a petition for special relief, pursuant to §76.7 of the Rules. That the Cable Branch categorizes the City's filing as a petition for special relief does not excuse TCI's late filing, argues the City, because the City's filing was not placed on public notice until after the due date for TCI's opposition pursuant to §1.45 of the Rules. The City states that it seeks a ruling, not relief, and needs swift resolution of the underlying issues to guide it in its franchise renewal discussions with TCI, and accordingly, §§1.2 and 1.45 of the Rules are the appropriate procedural rules to follow. Addressing the merits of TCI's opposition nevertheless, the City argues that translator authorization alone is insufficient to count towards the complement of signals determinative of the presence of effective competition. Both §76.33 of the Rules and the proceeding adopting it, *Cable Communications Act Rules*, 3 FCC Rcd at 2620, notes the City, require that a translator authorized to serve a community must encompass the community by a protected contour in order to be presumed to serve the community. Otherwise, states the City, actual signal availability must be demonstrated through the Commission's processes, the responsibility for which belongs to TCI, as do the costs. Merely submitting a study to the City is insufficient.

7. TCI opposes the City's motion to strike TCI's opposition, arguing that §1.2 of the Rules merely authorizes the Commission generally to issue declaratory rulings, while §76.7 of the Rules is the specific authorization for the Commission to issue declaratory rulings on cable matters. Therefore, states TCI, the procedural time frames of §76.7 apply, and not those of §1.45, which rule itself states that its time frames are subordinate to those otherwise provided.

8. In reply, the City denies that §1.2 of the Rules is merely an enabling rule, and contends that the procedural provisions of Subpart A of Part 1 of the Rules, in which §1.2 is contained, are the applicable provisions. In addition, the City claims that §76.7 does not preempt §1.45 of the Rules, because §76.7 does not state that it is the exclusive procedural mechanism for settling controversies affecting the cable industry.

DISCUSSION

9. The City's petition is properly processed pursuant to §76.7 of the Commission's Rules, the City's protests to the contrary notwithstanding. With respect to the cable television service, it is §76.7 of the Rules which governs requests to "the Commission . . . to issue a ruling on a complaint or disputed question." 47 C.F.R. §76.7(a). *See, e.g., Henson Aviation, Inc. (WHAG - TV)*, 83 FCC 2d 405, 410 (1980), *recon. denied*, 87 FCC 2d 1080 (1981). The filing deadlines set forth in §1.45 of the Rules are, by that rule's own terms, superseded "as otherwise provided in this chapter . . . ." 47 C.F.R. §1.45. Thus the filing periods established by §76.7 of the rules supersede those of §1.45, and therefore the City's motion to strike will be denied.

10. Turning to the merits of the City's request, our rules for determining the presence of effective competition are quite clear: the entire cable community must receive service from at least three unduplicated broadcast television signals. To be counted toward this three-signal complement, a signal must either be significantly viewed within the cable community, or place a predicted Grade B contour over the area in question. A translator station will be counted, if authorized to serve the community in question, "in the same manner as a full-service station," 47 C.F.R. §76.33(a)(2), basing its coverage area, however, on the translator station's protected contour rather than a predicted Grade B contour. Absent a ruling from this Commission, the foregoing are the sole criteria for determining the presence of effective competition in a given community.[4] While §76.33(a)(3) of the Rules allows for waivers of the criteria based upon a showing that actual Grade B service levels do (or do not) exist within the community, a Commission waiver is just that: a ruling from the Commission. No matter how sufficient a party's showing may appear to be, it is not the prerogative of any party to evaluate its own showing and to take action presuming its showing's sufficiency. *Continental Cablevision of New Hampshire, Inc.*, 53 RR 2d 747 (1983), *review denied*, 96 FCC 2d 926 (1984), *recon. denied*, 56 RR 2d 1360 (1984). Parties may not usurp the role of the Commission.

11. Pursuant to §76.33(a)(2) of the Rules, effective competition to TCI does not exist in Sterling, Colorado. No signals have been shown to be significantly viewed within the community. Only Station KTVS places a predicted Grade B contour over the community. No translator station authorized to serve Sterling places a protected contour over Sterling. This is conceded by TCI. Accordingly, the *prima facie* evidence in this case shows that Sterling is served by only one broadcast television signal, which is insufficient to support a finding of effective competition. Absent a contrary ruling from this Commission, and until the date of such a ruling, TCI's rates for basic cable service in Sterling are and have been subject to regulation by the City.

12. At the same time, we note that engineering data has been submitted to us in this proceeding, albeit not in the manner contemplated by our procedures. The City has submitted a copy of TCI's field strength measurements, together with an engineering analysis of TCI's data prepared for the City by its consulting engineer. As demonstrated by the City, however, TCI's study in its totality does not comport with §73.686 of our Rules. No community or topographic maps were submitted by TCI. The cable system did not include computations of the mean

and standard deviation of all measured field strengths. A detailed description of the measurement equipment and procedures was not included. Even considering the supplementary information provided by TCI in its opposition (*see* paragraph 5, *supra*), TCI's study --never formally presented by it to the Commission -- remains deficient, and cannot be the basis for a finding of effective competition. If TCI wishes to submit a study conducted in accordance with the Rules at a subsequent date, we will consider such a study in a separate proceeding.

13. In view of the foregoing, we find that grant of the City's petition is in the public interest.

14. Accordingly, IT IS ORDERED, pursuant to §0.283 of the Commission's Rules, that the "Motion to Strike," filed November 30, 1989, by the City of Sterling, Colorado, IS DENIED.

15. IT IS FURTHER ORDERED, pursuant to §0.283 of the Commission's Rules, that the "Motion for Declaratory Ruling" (CSR-3294), filed October 18, 1989, by the City of Sterling, Colorado, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

FOOTNOTES

[1] Pub. L. No. 98-549, §§1 *et seq.*, 98 Stat. 2779 (1984).

[2] 47 U.S.C. §521.

[3] The City contends that Television Broadcast Translator Station K27AG is no longer licensed to serve Sterling. This is not reflected in Commission records.

[4] Of course, cable system operators and franchising authorities may also agree to resolve disputes over effective competition through informal means. *Cable Communications Act Rules*, 3 FCC Rcd at 2625.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WTG-WEST, INC.,
Complainant,

v. File Nos. E-89-341,
E-89-437,
E-89-438

THE MOUNTAIN STATES
TELEPHONE AND TELEGRAPH
COMPANY, NORTHWESTERN
BELL TELEPHONE COMPANY, and
PACIFIC NORTHWEST BELL TELEPHONE
COMPANY,
Defendants.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

ORDER

Adopted: March 27, 1990; Released: April 2, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 28, 1989, WTG-West, Inc., filed a formal complaint against U.S. West, Inc., which is the regional holding company for the above-captioned defendants. This complaint was later amended so as to name these defendants separately in individual complaints. The complaints alleged that the defendants had violated Sections 201(b) and 202(a) of the Communications Act, 47 U.S.C. §§ 201(b), 202(a), by engaging in unjust and unreasonable practices and by unreasonably discriminating against WTG in the pricing and provisioning of DS3 service.

2. The parties conducted discussions aimed at resolving these complaints and subsequently reached a mutually satisfactory settlement of all pending controversies, with the defendants admitting no liability. On February 14, 1990, the parties filed a joint motion to dismiss the complaints with prejudice. Because a controversy between the parties no longer exists, we find that it is in the public interest to grant the parties' motion.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Joint Motion to Dismiss filed by the complainant and the defendants on February 14, 1990, IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE.

Before the
Federal Communications Commission
Washington, D.C. 20554

AMERICAN TELEPHONE
AND TELEGRAPH COMPANY,
Complainant,

v. File No. E-90-82

THE CHILLICOTHE TELEPHONE
COMPANY,
Defendant.

ORDER

Adopted: March 28, 1990; Released: April 2, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On November 22, 1989, American Telephone and Telegraph Company (AT&T) filed the above-captioned formal complaint with the Commission against The Chillicothe Telephone Company (Chillicothe) seeking damages for interstate access charges levied by Chillicothe against AT&T during the period from January 1, 1987 through December 31, 1988. Chillicothe has filed a motion to extend the time to respond to Complainant's First Set of Interrogatories until thirty days after the Commission has acted upon Chillicothe's pending motion to dismiss AT&T's complaint and upon Chillicothe's pending request that the captioned proceeding be held in abeyance. AT&T has opposed the motion.

2. Notwithstanding that the referenced motions are pending, the interests of justice will be served by requiring the parties to proceed with the discovery process. A review of the filings leads us to conclude that good cause has not been shown to justify delaying the discovery process. Nevertheless, in view of the passage of time since the filing, we will afford Chillicothe a thirty day extension of time from the release date of this Order to respond to Complainant's First Set of Interrogatories.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that Chillicothe's Motion For Extension of Time IS GRANTED in part and DENIED in part, to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-174

In the Matter of

Amendment of Section 73.202(b),	RM-7055
Table of Allotments,	RM-7115
FM Broadcast Stations.	
(El Rio and Ojai, California)	

NOTICE OF PROPOSED RULE MAKING

Adopted: March 16, 1990; Released: April 2, 1990

By the Chief, Allocations Branch:

1. Before the Commission for consideration are two separately-filed and mutually exclusive petitions for rule making. The first proposal, filed by Susan M. Ciborosky ("Ciborosky"), seeks the allotment of FM Channel 279A to El Rio, California, as that community's first local broadcast service. The second proposal, filed by Eric R. Hilding ("Hilding"),[1] requests the allotment of FM Channel 279A to Ojai, California, as that community's second local FM service. The respective proponents stated an intention to apply for the requested channels, if allotted.

2. A staff engineering review has determined that Channel 279A can be allotted to El Rio consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.[2] Alternatively, Channel 279A can be allotted to Ojai in conformity with the Commission's Rules provided the transmitter is restricted to an area at least 3.1 kilometers (2 miles) east [3] of the community to avoid short-spacing to Station KRUZ(FM), Channel 277B, Santa Barbara, California.[4] However, both requests cannot be accommodated in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules. The proposals are 23.3 kilometers apart whereas 105 kilometers is required between these two Class A cochannels. Therefore, we shall provide the proponents an opportunity to demonstrate in comments why their community should receive the requested allotment. In this regard, the parties should be guided by the allotment criteria set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). Additionally, the proponents may wish to determine if other channels may be available to resolve the existing conflict. Moreover, as El Rio and Ojai are each located within 320 kilometers (199 miles) of the U.S.-Mexico border, the Commission must obtain the Mexican Government's consent to the proposals.

3. In view of the above, we believe it is appropriate to solicit comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules with respect to the communities listed below, as follows:

City	Channel No. Present	Proposed
	OPTION I	
El Rio, California	--	279A
	OPTION II	
Ojai, California	288A	279A, 288A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 24, 1990,** and reply comments on or before **June 8, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, as follows:

Susan M. Ciborosky
1608 Highland Avenue
Hubertus, WI 53033
(Petitioner - El Rio, CA)

and

Eric R. Hilding
c/o Hilding Communications
P.O. Box 1700
Morgan Hill, CA 95038-1700
(Petitioner - Ojai, CA)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been

served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Although Hilding indicates that he is petitioning jointly with Miklos Benedek, only Hilding signed the petition. Moreover, although Hilding indicates that he is the "authorized consultant" for Benedek, in light of the provisions of Section 1.52 of the Commission's Rules, we will consider Hilding the sole petitioner. *See also Attorney Signature Requirements,* 58 RR 2d 130 (1985).

[2] Coordinates for this proposal are 34-14-33 and 119-12-17.

[3] The coordinates are 34-26-53 and 119-12-27.

[4] Coordinates at the licensed site of Station KRUZ(FM) are 34-31-30 and 119-57-10.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-175

In the Matter of

Amendment of Section 73.202(b), RM-7112
Table of Allotments,
FM Broadcast Stations.
(Goleta, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 16, 1990; Released: April 2, 1990

By the Chief, Allocations Branch:

1. A petition for rule making has been filed by Eric R. Hilding (petitioner)[1] seeking the allotment of FM Channel 290A to Goleta, California, as that community's second local broadcast service. Petitioner stated his intention to apply for the channel if allotted.

2. A staff engineering review has determined that Channel 290A can be allotted to Goleta consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is sited at least 12.7 kilometers (7.9 miles) west[2] of the community.

3. In view of the fact that Goleta could receive a second local FM service, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Goleta, California	292A	290A, 292A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 24, 1990,** and reply comments on or before **June 8, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, as follows:

Eric R. Hilding and
Miklos Benedek
c/o Hilding Communications
P.O. Box 1700
Morgan Hill, CA 95038-1700

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Although Hilding indicates that he is petitioning jointly with Miklos Benedek, only Hilding signed the petition. Moreover, although Hilding indicates that he is the "authorized consultant" for Benedek, in light of the provisions of Section 1.52 of the Commission's Rules, we will consider Hilding the sole petitioner. *See also Attorney Signature Requirements,* 58 RR 2d 130 (1985).

[2] Coordinates for this proposal are 34-26-30 and 119-58-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-284

In the Matter of

Amendment of Section 73.202(b),	RM-6138
Table of Allotments,	RM-6474
FM Broadcast Stations.	*RM-6489*
(Angola, Berne, *Decatur*, Lagrange, and Roanoke, *Indiana;* Brooklyn and Hudson, Michigan[1])	

REQUEST FOR SUPPLEMENTAL INFORMATION AND ORDER TO SHOW CAUSE

Adopted: March 15, 1990; Released: April 2, 1990

By the Chief, Allocations Branch:

1. The Commission issued a *Notice of Proposed Rule Making*, 3 FCC Rcd 4031 (1988), in the above-captioned proceeding proposing to substitute Channel 287B1 for Channel 261A at Angola, Indiana, and to modify the license of Station WLKI-FM, Channel 261A, in response to a petition filed on behalf of Lake Cities Broadcasting Corporation (LCBC). In order to accommodate the proposal, additional changes were proposed at Lagrange, Indiana, and Brooklyn, Michigan.[2] A counterproposal filed by Randall Bhirdo (RM-6474), [3] related to Hudson, Michigan, has been treated in a separate *First Report and Order* in this proceeding.[4] Midwest Communications Company (MCC), licensee of Station WQTZ(FM), Channel 224A, Decatur, Indiana, also filed a counterproposal (RM-6489),[5] seeking the substitution of Channel 286B1 for Channel 224A at Decatur and modification of its license accordingly.[6] MCC's proposal also seeks to substitute Channel 231A for Channel 286A at Roanoke, Indiana,[7] and to substitute Channel 224A for Channel 230A at Berne, Indiana.[8] Cascades Broadcasting, Inc., an applicant for Channel 287A at Brooklyn, Michigan, filed comments in support of MCC's proposal.[9] C.P. Broadcasters, Inc. ("CPB"), licensee of Station WIFF(FM), Auburn, Indiana, filed a petition for leave to file supplemental comments, which MCC has opposed.[10]

2. A staff engineering analysis reveals that Channel 286B1 can be allotted to Decatur consistent with the minimum distance separation requirements of the Commission's Rules[11] provided the transmitter is sited at least 20.1 kilometers (12.5 miles) northwest[12] of the community. Additionally, the spacing requirements would be met if Channel 231A is substituted for Channel 286A at Roanoke, Indiana,[13] and if Channel 224A is substituted for Channel 230A at Berne. The substitution at Berne requires a site restriction at least 2.5 kilometers north[14] of the community. Moreover, the spacings would be met based upon the directive to Station WIFF-FM, Auburn, Indiana, to move from Channel 288A to Channel 272A, pursuant to MM Docket No. 81-61.[15]

3. Before we may proceed with MCC's counterproposal for Channel 286B1, it is necessary to issue an *Order to Show Cause* to Judith A. Selby (Selby), permittee on Channel 286A at Roanoke.[16] MCC has indicated its willingness to compensate Selby for reasonable costs to be incurred in changing frequencies in the event its proposal is ultimately adopted. However, pursuant to the requirements of Section 1.87 of the Commission's Rules, Selby must be afforded the opportunity to respond to the proposed channel change in view of her status as a permittee. Moreover, the reimbursement policy applicable to Selby shall also apply with respect to CPB Broadcasters, Inc. (CPB), licensee of Station WIFF-FM, Auburn, Indiana, since the Decatur proposal also requires Station WIFF-FM to vacate Channel 288A (see footnote 14, *supra*). The distance between Auburn and Decatur is 40 kilometers, whereas 48 kilometers is required between second adjacent Class A and B1 channels. Thus, this *Request for Supplemental Information* seeks to determine MCC's willingness to reimburse CPB for its reasonable costs associated with the frequency change.[17]

4. In consideration of the foregoing, we propose to modify MCC's license pursuant to the provisions of Section 1.420(g)(3) of the Commission's Rules to specify operation on Channel 286B1, as requested. Although we will not accept competing expressions of interest in the Decatur modification, nor require that MCC demonstrate the availability of an additional equivalent channel at Decatur, a final determination regarding its modification proposal must await the outcome of the show cause order concerning the permit modification on Channel 286A at Roanoke, Indiana, as discussed herein, and the reimbursement requirements noted above. Although the Roanoke permittee is provided an opportunity to object to the proposed channel change, this *Order* does not afford additional opportunity either to comment on the merits of the proposals set forth in the *Notice*, or the proposal advanced in MCC's timely counterproposal to the *Notice*. The "cut-off" protection established in the *Notice* applies in both circumstances.

5. We shall also serve a copy of this *Notice* on the applicant for Channel 230A at Berne, Indiana. In the event the channel allotment at Decatur prevails in this proceeding prior to the issuance of a permit for Channel 230A at Berne, the applicant will be permitted to amend its application to specify the newly allotted channel without loss of cut-off protection since no upgrade in the class of channel will result. *See Salamanca, NY and Bradford, PA*, 50 FR 26208 (1985) and *Sanibel, FL*, 50 FR 32706 (1985).

6. Decatur, Berne and Roanoke, Indiana, are each located within 320 kilometers (200 miles) of the U.S.-Canada border. Therefore, the Commission must obtain Canadian concurrence to the proposals.

7. In view of the above, we propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

City	Channel No. Present	Proposed
	OPTION II [18]	
Angola, Indiana	261A	262A
Berne, Indiana	230A	224A
Decatur, Indiana	224A	286B1
Roanoke, Indiana	286A	231A

8. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Judith A. Selby, permittee on Channel 286A at Roanoke, Indiana, SHALL SHOW CAUSE why her permit should not be modified to specify operation on Channel 231A in lieu of Channel 286A.

9. Pursuant to Section 1.87 of the Commission's Rules, Judith A. Selby may, not later than **May 24, 1990,** file a written statement showing with particularity why her permit should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Judith A. Selby to furnish additional information. If Judith A. Selby raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Judith A. Selby will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

10. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Order* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to Judith A. Selby, P.O. Box 3252, Skokie, IL 60076, and to the applicant for Channel 230A at Berne, as follows: Robert Alan Weaver, 510 West Main Street, Portland, IN 47371; and by regular mail to C.P. Broadcasters, Inc., Radio Station WIFF-FM, 5446 CR 29, Auburn, IN 46706.

11. Interested parties should file their comments on or before **May 24, 1990,** and reply comments on or before **June 8, 1990,** and are advised to read the Appendix to the *Notice* in this proceeding for the proper procedures. Additionally, a copy of such comments should be served on petitioner's counsel, as follows:

Earl R. Stanley, Esq.
Kenneth E. Satten, Esq.
Christine V. Simpson, Esq.
Wilkinson, Barker, Knauer & Quinn
1735 New York Avenue, NW
Washington, DC 20006

12. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

13. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The communities of Berne, Decatur, and Roanoke, Indiana, as well as Hudson, Michigan, have been added to the caption.

[2] LCBC subsequently withdrew its modification proposal for Channel 287B1 and has requested consideration of Channel 262A at Angola instead. That proposal, while incorporated herein, will be addressed in the *Second Report and Order* to be issued in this proceeding. Coordinates for Channel 262A at Angola are 41-40-51 and 85-00-02.

[3] Public Notice of Bhirdo's counterproposal was given August 22, 1988, Report No. 1745.

[4] Although a petition for reconsideration of the *First Report and Order* has been filed, that petition does not seel. relief which would materially affect the outcome of the remaining proposals in this proceeding.

[5] Public Notice of MCC's counterproposal was given September 9, 1988, Report No. 1747.

[6] Richard A. Sterling and Judith A. Selby filed Joint Comments and a Further Counterproposal to MCC's counterprpoosal. However, since the Commission's Rules do not permit such filing, it will not be considered. *See* Section 1.420(d) of the Commission's Rules.

[7] A construction permit has been issued on Channel 286A at Roanoke (BPH-880107MG) to Judith A. Selby.

[8] Channel 230A was allotted to Berne in MM Docket No. 84-231. After the window period for the allotment closed, one application was received (File No. 881221MM).

[9] As indicated in the *Notice*, the four applicants for Channel 287A at Brooklyn, Michigan, would be required to amend their applications to Channel 225A to accommodate LCBC's original modification proposal at Angola. However, they are not affected by LCBC's amended proposal nor by MCC's counterproposal.

[10] CPB's comments were filed approximately fifteen months after the "cut-off" date specified for filing comments in this proceeding, in contravention of Section 1.415(d) of the Commission's Rules. Also, they constitute a late-filed counterproposal, in violation of Section 1.420(d) of the Commission's Rules. Thus, they cannot be considered.

[11] Since the Decatur proposal was filed prior to October 2, 1989, the minimum distance separation requirements referenced herein are based on the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 CFR § 73.213(c).

[12] Coordinates used for Channel 286B1 at Decatur are 40-58-33 and 85-04-23.

[13] Channel 231A may be used at the site specified in the construction permit issued to Selby on Channel 286A at Roanoke at coordinates 40-55-00 and 85-27-30, or at the site specified in its pending application for modification of construction permit at coordinates 40-59-54 and 85-15-58 (BMPH-890711IC).

[14] Coordinates used for Channel 224A at Berne are 40-40-46 and 84-57-17.

[15] The Angola modification proposal, as originally filed, was based in part upon the directive issued to C. P. Broadcasters, Inc. ("CPB"), licensee of Station WIFF-FM, Auburn, Indiana, to vacate Channel 288A to accommodate the allotment of Channel 288A at Lagrange, Indiana. CPB responded to the *Notice* in this proceeding, as requested, concerning its plans to move. In this regard, CPB advises that while it intends to abide by the Commission's directive in MM Docket No. 81-61, it is reluctant to do so until there is a permittee at Lagrange to reimburse its costs associated with the frequency change. Although CPB had discussions with the former Lagrange permittee, CPB advises that the latter's permit was cancelled. The Decatur proposal is also premised on Station WIFF-FM vacating Channel 288A at Auburn. Therefore, CPB asserts that if this proceeding is ultimately adopted contingent upon its move to Channel 272A, the permittee selected as a result of this proceeding should be required to assume the reimbursement costs presently incumbent on any new permittee selected on Channel 288A at Lagrange.

[16] At the time MCC's counterproposal was filed, Selby was an applicant for Channel 286A at Roanoke. Thus, MCC was not required to serve its counterproposal on Selby. However, approximately two months later, Selby was granted a construction permit on Channel 286A (BPH-880107MG). Therefore, pursuant to the provisions of Section 1.87 of the Commission's Rules, we are issuing an *Order to Show Cause* to Selby to afford her an opportunity to demonstrate in comments why the permit for Channel 286A should not be modified in the event MCC's proposal prevails.

[17] As is our general policy, the Commission will take no action forcing CPB to change frequencies for Station WIFF-FM until a permit is issued for Channel 288A at Lagrange. However, since MCC's proposal also requires CPB to vacate Channel 288A at Auburn, if successful in this proceeding, MCC could proceed independently with the reimbursement costs to CPB prior to the selection of a permittee at Lagrange. MCC could then seek a *pro rata* share of its costs from any eventual Lagrange permittee.

[18] The Angola modification proposal, set forth in the *Notice*, is considered as OPTION I and will not be repeated here.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-176

In the Matter of

Amendment of Section 73.202(b), RM-7053
Table of Allotments,
FM Broadcast Stations.
(Columbia, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 16, 1990; Released: April 2, 1990

By the Chief, Allocations Branch:

1. A petition for rule making has been filed by Eric R. Hilding (petitioner) seeking the allotment of FM Channel 255A to Columbia, California, as that community's first local broadcast service. Petitioner stated his intention to apply for the channel if allotted.

2. Section 307(b) of the Communications Act of 1934, as amended, mandates that the Commission fairly, equitably, and efficiently distribute frequencies " . . . among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to demonstrate its status. Columbia is not listed in the U.S. Census. Therefore, Hilding should present the Commission with sufficient information to demonstrate that Columbia is incorporated, or that it has social, economic, cultural, or governmental indicia to qualify it as a "community" for allotment purposes. *See, e.g., Ansley, Alabama*, 46 Fed. Reg. 58688, published December 3, 1981, *Cascade Village, Colorado*, 48 Fed. Reg. 19917, May 3, 1983; *Ellwood, California*, 50 Fed. Reg. 13031, published April 2, 1985.

3. A staff engineering review has determined that Channel 255A can be allotted to Columbia consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.[1]

4. In view of the fact that Columbia could receive a first local broadcast service, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Columbia, California	–	255A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **May 24, 1990,** and reply comments on or before **June 8, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Eric R. Hilding
P.O. Box 1700
Morgan Hill, CA 95038-1700

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Coordinates for this proposal are 38-02-11 and 120-24-01.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-177

In the Matter of

Amendment of Section 73.202(b), RM-7116
Table of Allotments,
FM Broadcast Stations.
(Susanville, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 16, 1990; Released: April 2, 1990

By the Chief, Allocations Branch:

1. A petition for rule making has been filed by Susan M. Ciborosky (petitioner) seeking the allotment of Channel 242C2 to Susanville, California, as that community's second local FM service. Petitioner stated her intention to apply for the channel if allotted.

2. A staff engineering analysis has determined that Channel 242C2 can be allotted to Susanville in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is located at least 7.9 kilometers (4.9 miles) west[1] of the community.

3. In view of the fact that Susanville could receive an additional local FM service, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Susanville, California	227C	227C, 242C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 24, 1990,** and reply comments on or before **June 8, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner and her consultant, as follows:

Susan M. Ciborosky
1608 Highland Avenue
Hubertus, WI 53033

and

Larry G. Fuss
Contemporary Communications
P.O. Box 159
Fayetteville, GA 30214
(Consultant)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Coordinates for Channel 242C2 at Susanville are 40-26-55 and 120-44-20.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-115

In re Applications of

AMMERMAN ENTERPRISES, INC. (hereafter "Ammerman")	File No. BPH-880523ME
NORTH STAR COMMUNICATIONS, INC. (hereafter "North Star")	File No. BPH-880523MN
GARDINER BROADCASTING CORP. (hereafter "Gardiner")	File No. BPH-880523MU
OAK CREEK COMMUNICATIONS, INC. (hereafter "Oak Creek")	File No. BPH-880523MX

For Construction Permit
for a New FM Station on Channel 241C2
in Bay City, Texas

HEARING DESIGNATION ORDER

Adopted: February 28, 1990; Released: April 3, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

3. *Petition for Leave to Amend.* North Star petitioned for leave to amend its application on October 4, 1988, January 23, 1989 and again on June 14, 1989. All accompanying amendments were filed after September 8, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

4. Pursuant to 47 C.F.R. § 1.65, applicants are required timely to amend their applications to keep them substantially complete and accurate. Whenever information furnished in a pending application is no longer substantially complete and accurate in all significant respects, or whenever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant is required to amend its application to furnish such information within 30 days. Staff investigation reveals that Oak Creek failed to report the sale of Station KIOX, Bay City, Texas (File No. BAL-880610EB, granted May 9, 1989), a station in which one of its principals, Brenda Clark Harrison, had a 100% ownership interest. Accordingly, Oak Creek will be required to file an amendment updating its ownership interests.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a a subsequent Order upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED That, the Petitions for Leave to Amend filed by North Star ARE GRANTED and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

8. IT IS FURTHER ORDERED That, within 30 days of the release of this Order, Oak Creek shall file with the presiding Administrative Law Judge and amendment completely and accurately updating the status of its current media interests.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall pursuant to Section 311 (a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-144

In re Applications of

A. L. P. LIMITED PARTNERSHIP (hereafter "ALP Ltd.") — File No. BPH-880602ND

JOSEPH LARK KITCHENS (hereafter "Kitchens") — File No. BPH-880602NM

STEHLE BROADCASTING, INC. (hereafter "Stehle ") — File No. BPH-880602NS

For Construction Permit
for a New FM Station on
Channel 248A (97.5 MHz)
in Jeffersonville, Georgia

HEARING DESIGNATION ORDER

Adopted: March 6, 1990; Released: April 3, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *ALP Ltd.* In response to Section III, FCC Form 301, ALP Ltd. indicated that it was not financially qualified to construct and operate the requested facilities for three months without revenue, but added that it was "in the process of gaining financial support". To date, no amendment has been received updating the current financial status of the applicant. Accordingly, an appropriate issue will be specified to determine ALP Ltd.'s financial qualifications.

3. On September 18, 1989, the Commission released a *Report and Order* in MM Docket No. 88-460 to amend the FM *Table of Allotments*. This *Report and Order*, which became effective on November 3, 1989, changes the allocation for Jeffersonville, Georgia, from Channel 248A to Channel 229A. Consequently, the applicants in this proceeding are required to amend their proposals to specify the new channel. To date, no such amendments have been received. Accordingly, each of the applicants in this proceeding will be required to submit a post-designation amendment to specify the new allocation, to the presiding Administrative Law Judge.

4. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to ALP Ltd., whether the applicant is financially qualified.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That the applicants in this proceeding shall submit the amendment as required by MM Docket No. 88-460, to the presiding Administrative Law Judge within 30 days of the release of this Order.

8. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

9. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-173

In the Matter of

Amendment of Section 73.202(b), RM-7171
Table of Allotments,
FM Broadcast Stations.
(Doolittle, Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 15, 1990; Released: April 3, 1990

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Howard Smith (petitioner), requesting the allotment of FM Channel 283A to Doolittle, Missouri, as that community's first local service. Petitioner submitted information in support of the proposal and stated his intention to file an application for the channel.

2. We believe petitioner's proposal to provide Doolittle with its first local service warrants consideration. Doolittle is listed in the 1980 U.S. Census as an incorporated community with a population of 701 persons. However, to avoid a conflict with a construction permit for Channel 283A, Station KSLQ-FM, Washington, Missouri, we shall propose the allotment of Channel 264A to Doolittle. Channel 264A can be allotted to Doolittle, Missouri, in compliance with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 10.1 kilometers (6.3 miles) west of the community.[1] The site restriction will prevent a short spacing to Station KTUI-FM, Channel 265A, Sullivan, Missouri, and to a construction permit for Station KGMO, Channel 264C, Cape Girardeau, Missouri.

3. In view of the fact that the proposed allotment could provide a first local service to Doolittle, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Doolittle, Missouri	—	264A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 25, 1990,** and reply comments on or before **June 11, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Howard Smith
3309 S. Franklin
Springfield, Missouri 65807

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 264A at Doolittle are 37-56-33 and 91-59-45.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-105

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Lonoke, Arkansas and Clarksdale, Mississippi) — RM-7165

ERRATA

Released: April 3, 1990

On March 9, 1990, the Commission released a *Notice of Proposed Rule Making and Order to Show Cause* (DA 90-298), in the above-captioned proceeding. The second sentence of paragraph 2 of the *Notice* is corrected to read as follows:

> A staff analysis has determined that Channel 229A, requested as a substitute for Channel 292A at Clarksdale, Mississippi, is short-spaced to a pending rule making proposal at Forrest City, Arkansas (MM Docket No. 89-564). Therefore, in an effort to accommodate the petitioner's proposal, we have determined that Channel 287A can be substituted for consideration at the present transmitter site of Station WAID(FM).[2]

Accordingly, reference to "Channel 229A" at Clarksdale, Mississippi, should be corrected to read "Channel 287A" in paragraphs 3, 4, 5 and 6 of the *Notice*.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-145

In re Applications of

DECATUR CHRISTIAN RADIO, INC. (hereafter Decatur) File No. BPH 880405MA

HOWARD G. BILL (hereafter Bill) File No. BPH 880407MU

For Construction Permit
for a New FM Station on Channel 226
in Decatur, Illinois

HEARING DESIGNATION ORDER

Adopted: March 6, 1990; Released: April 3, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Late-filed amendment: Bill.* 47 CFR 73.3522(a)(6) provides that an applicant may only amend as of right during the 30 day period following a notice of tenderability in that same proceeding. The rule further states that "subsequent amendments prior to designation for hearing or grant will be considered only upon a showing of good cause for late filing, or pursuant to sec. 1.65 or sec. 73.3514. Unauthorized or untimely amendments are subject to return by the FCC's staff without consideration."

3. On November 21, 1988, Bill filed an amendment to report a change in antenna height and location because the Federal Aviation Administration (FAA) advised him that his original site would have an adverse effect on its aeronautical operations. On June 28, 1989, Decatur filed an amendment to change their proposed tower site because the Federal Aviation Administration (FAA) determined that the site originally proposed by Decatur would also be a hazard to air navigation. The above referenced amendments were filed after the last day for filing minor amendments as of right. Therefore, good cause must be shown for acceptance of these late filed amendments. We find that the applicants have shown good cause for acceptance of the above referenced amendments. Accordingly, Bill's November 21, 1989 Petition for Leave to Amend, and Decatur's June 28, 1989 Petition for Leave to Amend are granted and the associated amendments will be accepted. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

4. *Late-filed amendments.* The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after May 16, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
Decatur	June 28, 1989 (Eng.); December 15 1989
Bill	August 22, 1988, (Eng); September 13, 1988; November 21, 1988 (Eng); January 23, 1990

5. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Decatur has filed such statement, it is deficient. Decatur has not listed its hiring and recruitment sources for women. Accordingly, Decatur will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

6. The engineering data submitted by Decatur and Bill show that their proposals would not provide a 3.16 mV/m signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission's rules. Decatur indicates that it will achieve 99% city coverage, while Bill has indicated that his proposal would reach 93% of Decatur; each has requested a waiver of the city coverage rule, if necessary.[1] The FM Branch does not require waiver of this requirement unless the proposed 3.16 mV/m coverage falls below 80% of the area of the principal community. *See John R. Hughes*, 50 Fed. Reg. 5679 (February 11, 1985). *See also Southwest Communications, Inc.*, released July 16, 1986 (letter from the Chief, FM Branch, reference 8920-HVT). Engineering study reveals that both proposals are in substantial compliance with this requirement. Accordingly, no waiver is required.

7. *Financial.* At Section III of FCC Form 301 (the application), each applicant is asked to answer the question whether they either have sufficient net liquid assets on hand or available from committed sources to construct and operate the requested facility for three months without revenue. When Bill filed his form 301 on April 7, 1988, he answered that question "no". But he added this statement: The applicant will certify as to his financial qualifications by amendment." No such amendment was filed. Accordingly, an appropriate issue will be specified below.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR

HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to Howard G. Bill, whether the applicant is financially qualified.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Bill and Decatur ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

11. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Decatur shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

12. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] We should note here that the applicants are proposing to operate with identical facilites from the same transmitter site.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-117

In re Applications of

PISTOLE BROADCASTING CO. (hereafter: Pistole)	File No. BPH-870327KF
BENNY CARLE BROADCASTING, INC. (hereafter: BCB)	File No. BPH-870327KH
SANCTIFIED FM LIMITED PARTNERSHIP (hereafter: Sanctified)	File No. BPH-870327ME
VONCILE R. PEARCE (hereafter: Pearce)	File No. BPH-870330NB
CCI-FM, LTD. (hereafter: CCI)	File No. BPH-870331ME
TRIAD BROADCASTING CO. (hereafter: Triad)	File No. BPH-870331OV
PRIMEMEDIA BROADCASTING (hereafter: PrimeMedia)	File No. BPH-870331PJ
CLARENCE T. BARINOWSKI (hereafter: Barinowski)	File No. BPH-870331PS
FLORENCE RADIO JOINT VENTURE (hereafter: FRJV)	File No. BPH-870415MG
WILLIAM PAXTON ROGERS (hereafter: Rogers)	File No. BPH-870327MK (Dismissed Herein)

For Construction Permit for a New FM Station on Channel 241A in Florence, Alabama

HEARING DESIGNATION ORDER

Adopted: February 28, 1990; Released: April 3, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Preliminary Matters.* On August 21, 1987, Rogers filed a motion to dismiss his application and the petition for reconsideration of the return of his application filed on May 29, 1987. On October 22, 1987, Rogers petition for reconsideration was granted and his application was reinstated. On November 3, 1987, Rogers again requested that his application be dismissed. Accordingly, Rogers' application will be dismissed herein.

3. On November 30, 1987, BCB filed a petition to deny against each of the above-captioned applications. BCB's petitions are essentially petitions to specify issues. Since the Commission's *Revised Procedures for the Processing of Contested Broadcasting Applications; Amendment of Part 2 of the Commission's Rules*, Report and Order, 72 FCC 2d 202 (1979), directed the deletion of all issue pleadings in pending cases, the matters sought to be raised in this petition have not been considered herein. Accordingly, the petitions to deny filed by BCB will be dismissed. However, an opportunity to raise these allegations will be afforded BCB post-designation pursuant to 47 C.F.R. § 1.229.

4. *Pistole.* Pistole proposes to side-mount its antenna on an existing tower utilized by station WLAY-FM, Muscle Shoals, Alabama. However, engineering study of Pistole's application reveals a discrepancy between the site elevation above mean sea level (AMSL) listed in Pistole's application and that on file in the Commission's records. Pistole's proposal shows the site elevation to be 522 feet AMSL, while the Commission's records (and those of the Federal Aviation Administration) show the elevation to be 520 feet AMSL. Since this is an existing tower on file with the Commission, the discrepancy is neither a tenderability nor an acceptability defect, and therefore may be corrected by amendment. Accordingly, Pistole must either amend its application to specify a site elevation consistent with that in Commission files or file FAA Form 7460-1 to correct the actual site elevation.

5. *Sanctified.* Information before the Commission indicates that Sanctified was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

6. An identical three-fold issue was specified in each of these proceedings: whether or not Sonrise was a real party in interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question Sanctified's qualification to be a Commission licensee. Therefore, since the issue remains unanswered, it will be specified and tried in this proceeding.

7. Item 5(e) of Section II, FCC Form 301 (October 1986) requires applicants to indicate if the applicant or any party to it has or has had an interest in "a broadcast application in any pending or concluded Commission proceeding which left unresolved character issues against the application." If answered in the affirmative, the applicant is to provide the name of the party having an interest, the nature of the interest or connection and dates, the call letters or file number of the application or docket number, and the location. Sanctified has responded to Item 5(e) in the negative. However, Commission records indicate that Gary A. Simpson and Alfred Ray Patton are limited partners in the Solona, Florida proceeding. Additionally, Ronald Dean Kidd is a limited partner in a Goodlettsvillle, Tennessee proceeding, MM Docket No.88-487. However, Sanctified has failed to timely amend its application pursuant to 47 C.F.R. § 1.65 to notify the Commission of the outstanding character issues. Accordingly, an appropriate issue will be specified below.

8. *PrimeMedia*. In response to Item 3(b), Section II of FCC Form 301 (April 1985), PrimeMedia answered in the affirmative, stating that one source of its credit financing is Worms & Co., Inc., a domestic (Delaware) investment banking corporation located in New York, New York, which is a wholly-owned subsidiary of Banque Worms et Cie Suisse (S.A.), a Swiss financial services company. This statement does not provide sufficient detail to enable a determination as to whether PrimeMedia is in compliance with statutory and regulatory requirements. Accordingly, PrimeMedia will be required to submit an amendment fully disclosing the details of this arrangement.

9. *Barinowski*. As part of the "program of random checks of the financial qualifications of applicants for construction permits" announced in the Commission's March 19, 1987 *Public Notice* (Mimeo No. 2418), the Bureau required that all applicants in the 1988 Murrells Inlet, South Carolina proceeding furnish documentary proof of their respective financial certifications. (MM Docket No. 88-296). Augusta Radio Fellowship Institute, Inc., of which Barinowski is president, an applicant in the Murrells Inlet proceeding (BPED-870730MV), submitted deficient documentation as to its financial ability to construct and operate the facilities for the 11 construction permit applications pending at the time of the filing of the Murrells Inlet application. Accordingly, the following issues were added against Fellowship in the *Hearing Designation Order*:

> 3. To determine with respect to . . . Fellowship whether, in light of the evidence adduced concerning the deficiencies set forth above in this Order, the applicant [is] financially qualified.
>
> 4. To determine (a) whether, in light of the evidence adduced pursuant to issue 3, above, Fellowship made misrepresentations to the Commission, was lacking in candor in its dealings with the Commission or attempted to deceive or mislead the Commission and (b) if issue (a) is resolved in the affirmative, the effect thereof on Fellowship's basic qualifications to be a Commission licensee.

10. Pursuant to Fellowship's November 10, 1988 request, in a *Memorandum Opinion and Order* released February 1, 1989, the presiding Administrative Law Judge dismissed Fellowship's application with prejudice; the above issues were never tried. These unresolved issues call into question Barinowski's qualification to be a Commission licensee. Therefore, such issues will be specified and tried against Barinowski in this proceeding.

11. Item 5(e) of Section II, FCC Form 301 (October 1986) requires applicants to indicate if the applicant or any party to it has or has had an interest in "a broadcast application in any pending or concluded Commission proceeding which left unresolved character issues against the application." If answered in the affirmative, the applicant is to provide the name of the party having an interest, the nature of the interest or connection and dates, the call letters or file number of the application or docket number, and the location. Barinowski responded to Item 5(e) in the negative. However, Commission records indicate that Barinowski is president of Augusta Radio Fellowship, against whom, as indicated above, financial and misrepresentation issues were designated in the *Hearing Designation Order* in MM Docket No. 88-296. Barinowski failed to timely amend its application pursuant to 47 C.F.R. § 1.65 to notify the Commission of the outstanding character issues.[2] Accordingly, an appropriate issue will be specified below.

12. *EEO*. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Sanctified has filed such statement, it is deficient. Sanctified has not listed any black-oriented organizations for recruitment purposes even though 8% of the labor force in the proposed service area is black. The EEO statement filed by Pearce is also deficient. Pearce has not listed a women's organization for recruitment purposes. Accordingly, Sanctified and Pearce will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

13. *Divestiture*. Vickki Diane Shelton is an employee, but not an officer, director or shareholder, of Big River Broadcasting Corp., licensee of WSBM(AM) and WQLT(FM), Florence, Alabama. Shelton has indicated her intent to terminate her relationship with Big River Broadcasting Corp. in the event of grant of the referenced application. Accordingly, in the event of grant of Sanctified's application, Shelton will be required to sever all connections with Big River Broadcasting Corp. prior to the commencement of program test authority.

14. *Late - filed Amendments*. The applicants have petitioned for leave to amend their applications on the dates specified below. The accompanying amendments were filed after June 29, 1987, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
BCB	September 23, 1988
Sanctified	October 20, 1988; November 15, 1988; December 13, 1988; December 22, 1988; December 28, 1988; January 13, 1989
Pearce	July 20, 1987; Feb. 12, 1988; June 8, 1988; Aug. 5, 1988; April 4, 1989; July 10, 1989; November 13, 1989; January 18, 1990
Barinowski	March 1, 1988 (eng.); June 28, 1988; April 10, 1989

15. *City Coverage*. CCI, Triad and FRJV do not provide a 3.16 mV/m signal to the entire proposed city of license as required by Section 73.315(a) of the Commission's Rules. Each applicant has requested a waiver of Section 73.315. The FM Branch does not require waiver of this requirement unless the proposed 3.16 mV/m coverage falls below 80% of the area of the principal community. *See John R. Hughes*, 50 Fed. Reg. 5679 (February 11, 1985). *See also Southwest Communications, Inc.*, released July 16, 1986 (letter from the Chief, FM Branch, reference 8920-HVT). Each applicant's 3.16 mV/m contours are in substantial compliance with this requirement: CCI's contour covers approximately 93.35% of the community of license; Triad's approximately 95%; and FRJV's approximately 90%. Accordingly, no waiver is required and the waiver requests of CCI, Triad and FRJV will be dismissed as moot.

16. *Areas and Populations*. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

17. *Air Hazard*. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicants have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by Sanctified, CCI, PrimeMedia, and FRJV would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

18. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

19. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Sanctified.

2. To determine whether Sanctified's organizational structure is a sham.

3. To determine whether Sanctified violated Section 1.65 of the Commission's Rules, and/or lacked candor, by failing to report the designation of character issues against other applicants in which one or more of its partners has an ownership interest and/or the dismissal of such ownership interest and/or the dismissal of such applications with unresolved character issues pending.

4. To determine, from the evidence adduced pursuant to Issues 1 through 3 above, whether Sanctified possesses the basic qualifications to be a licensee of the facilities sought herein.

5. To determine, with respect to Barinowski, whether, in light of the evidence adduced concerning the deficiencies set forth in the *Hearing Designation Order* in Docket 88-296, the applicant is financially qualified.

6. To determine whether Barinowski violated Section 1.65 of the Commission's Rules, and/or lacked candor, by failing to report the designation of character issues against Augusta Radio Fellowship Institute, Inc., of which Barinowski is president, an applicant in the proceeding in Docket 88-296 whose application was dismissed at its request prior to resolution of the character issues.

7. To determine (a) whether, in light of the evidence adduced pursuant to Issue 5 above, Augusta Radio Fellowship Institute, Inc. made misrepresentations to the Commission, was lacking in candor in its dealings with the Commission or attempted to deceive or mislead the Commission, and (b) if issue (a) is resolved in the affirmative, the effect thereof on Barinowski's basic qualifications to be a Commission licensee of the facilities sought herein.

8. To determine whether there is a reasonable possibility that the tower height and location proposed by the Sanctified, CCI, PrimeMedia, and FRJV would constitute a hazard to air navigation.

9. To determine which of the proposals would, on a comparative basis, best serve the public interest.

10. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

20. IT IS FURTHER ORDERED, That, pursuant to his request, Rogers' application IS DISMISSED.

21. IT IS FURTHER ORDERED, That the petitions to deny filed by BCB against each applicant ARE DISMISSED.

22. IT IS FURTHER ORDERED, That Pistole shall file the site elevation clarification amendment specified in paragraph 4 above with the presiding Administrative Law Judge within 30 days of the release of this Order.

23. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, pursuant to paragraph 8 herein, PrimeMedia shall submit an amendment fully disclosing the details of its financial arrangement with the alien-controlled domestic entity providing its financing to the presiding Administrative Law Judge.

24. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Sanctified and Pearce shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

25. IT IS FURTHER ORDERED, That, in the event of grant of Sanctified's application, Vickki Diane Shelton will be ordered to divest herself of all interests in and sever all connections with Big River Broadcasting Corp. prior to the commencement of program test authority.

26. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by BCB, Sanctified, Pearce and Barinowski ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

27. IT IS FURTHER ORDERED, That the waiver requests filed by CCI, Triad an FRJV ARE DISMISSED as moot.

28. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

29. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

30. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

31. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] The application of Muscle Shoals Broadcasting (BPH-870420MB) was returned as untimely filed on October 27, 1987.

[2] Barinowski also failed to report the return of two other applications, BPED-860808MB, Florence, South Carolina, and BPED-860624MF, Huntsville, Alabama.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-298

In the Matter of

Amendment of Section 73.202(b), RM-6703
Table of Allotments,
FM Broadcast Stations.
(Decorah, Iowa)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 14, 1990; Released: April 3, 1990

By the Chief, Allocations Branch:

1. At the request of Decorah Radio, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 5288 (1989), proposing the substitution of Channel 263C2 for Channel 265A at Decorah, Iowa, and the modification of its license for Station KRDI-FM to specify operation on the higher powered channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 263C2 for Channel 265A at Decorah, since it could enable Station KRDI-FM to expand its coverage area. Channel 263C2 can be allotted to Decorah in compliance with the Commission's minimum distance separation requirements with a site restriction of 2.9 kilometers (1.8 miles) north to accommodate petitioner's desired transmitter site.[1] As proposed, we will also modify the license of Station KRDI-FM to specify Channel 263C2.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 18, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Decorah, Iowa	263C2

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Decorah Radio, Inc., for Station KRDI-FM, Decorah, Iowa, IS MODIFIED to specify operation on Channel 263C2, in lieu of Channel 265A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 43-19-26 and West Longitude 91-47-04.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-297

In the Matter of

Amendment of Section 73.202(b), RM-6698
Table of Allotments,
FM Broadcast Stations.
(Hatteras, North Carolina)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 14, 1990; Released: April 3, 1990

By the Chief, Allocations Branch:

1. At the request of Pamlico Sound Company, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 5351 (1989), proposing the substitution of Channel 246C1 for Channel 248C2 at Hatteras, North Carolina, and the modification of its construction permit for Station WYND-FM to specify the higher powered channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 246C1 for Channel 248C2 at Hatteras, North Carolina, since it could enable Station WYND-FM to expand its coverage area. As proposed, we will also modify petitioner's construction permit to specify operation on Channel 246C1. Channel 246C1 can be allotted to Hatteras in compliance with the Commission's minimum distance separation requirements and can be used at the site specified in Station WYND-FM's construction permit.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 18, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Hatteras, North Carolina	246C1

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Pamlico Sound Company, Inc., for Station WYND-FM, Hatteras, North Carolina, IS MODIFIED to specify operation on Channel 246C1, in lieu of Channel 248C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 35-15-42 and West Longitude 75-33-20.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-300

In the Matter of

Amendment of Section 73.202(b), RM-6708
Table of Allotments,
FM Broadcast Stations.
(York, Nebraska)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 14, 1990; Released: April 3, 1990

By the Chief, Allocations Branch:

1. At the request of Gleason Broadcasting Company, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 5292 (1989), proposing the substitution of Channel 285C2 for Channel 285A at York, Nebraska, and the modification of its license for Station KAWL-FM accordingly. Comments were filed by the petitioner and reply comments were filed by Genesis Radio Partners ("Genesis").

2. Petitioner supports the upgrading of its station. However, it requests that Station KAWL-FM be upgraded to specify operation on Channel 285C3 rather than Channel 285A. In support, it states that upgrading to a Class C3 operation would be a more efficient means of expanding its coverage area. It states that it will apply for Channel 285C3, if allotted.

3. Genesis opposes grant of the petition. It states that Ms. E. Louise Gleason is the sole 100% shareholder of Gleason Broadcasting Company, Inc., and the former sole 100% shareholder of Saline County Radio, Inc. ("SCR"), licensee of Station KBVB-FM, Crete, Nebraska. In August of 1989, Genesis states that it filed a complaint against SCR in the District Court of Douglas County, Nebraska, seeking damages for legal and engineering expenses incurred on behalf of SCR, and for equipment loaned to SCR. Genesis argues that the pendency of the claim against SCR raises a substantial question as to whether the petitioner can implement the proposed upgrade. Further, it believes that the upgrade at York should not be approved while a question concerning petitioner's financial qualifications remains outstanding since it might have a preclusive effect upon other proposed frequency uses.

4. After carefully reviewing the pleadings before us, we believe that the public interest would be served by substituting Channel 285C3 for Channel 285A at York, Nebraska, since it could enable Station KAWL-FM to expand its coverage area. Further, we find that the unadjudicated allegation of Genesis concerning financial misconduct by SCR is a private matter between the two parties and unrelated to the issue of whether the public interest would be furthered by the provision of an upgraded service at York. Channel 285C3 can be allotted to York in compliance with the Commission's minimum distance separation requirements and can be used at Station KAWL-FM's licensed transmitter site.[1] As proposed, we will modify petitioner's license for Station KAWL-FM to specify operation on Channel 285C3.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 18, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
York, Nebraska	285C3

6. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Gleason Broadcasting Company, Inc., for Station KAWL-FM, York, Nebraska, IS MODIFIED to specify operation on Channel 285C3, in lieu of Channel 285A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Laitude 40-50-30 and West Longitude 97-35-16.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-299

In the Matter of

Amendment of Section 73.202(b),	RM-6696
Table of Allotments,	RM-6661
FM Broadcast Stations.	
(Lopez and Dushore, Pennsylvania)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 15, 1990; Released: April 3, 1990

By the Chief, Allocations Branch:

1. At the request of Robin B. Thomas (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 5290 (1989), proposing the allotment of Channel 233A to Lopez, Pennsylvania, as its first local FM service. Petitioner states that he will apply for the channel, if allotted.[2]

2. The *Notice* stated that Channel 233A could be allotted to Lopez in compliance with the Commission's minimum distance separation requirements. However, we requested the petitioner to furnish sufficient information to demonstrate that Lopez has the social, economic and cultural indicia to qualify it as a community for allotment purposes. The *Notice* indicated in footnote 1 that Lopez is listed in the Rand McNally Commercial Atlas as having a population of 300 persons. In response, petitioner states that Lopez is not incorporated but is an "organized" community. He further states that Lopez, although small, "has several churches, businesses, and some light industry." He also furnishes a copy of U.S.G.S. map entitled Lopez Quadrangle which contains the designation "Lopez."

3. Based on the record before us, we are unable to find that Lopez is a "community" for allotment purposes. Lopez is not listed in the U.S. Census or incorporated. Petitioner provides no information as to the existence of any local government, businesses which identify themselves with Lopez, or any civic organizations, such as a Chamber of Commerce, Lions Club, or Rotary Club. Petitioner merely states that the Lopez is an "organized" community, with several churches, businesses and some light industry. Therefore, we find that there is an insufficient factual basis to warrant a determination that Lopez is a community for allotment purposes.

4. Accordingly, IT IS ORDERED, That the petition of Robin B. Thomas to allot Channel 233A to Lopez, Pennsylvania, IS DENIED. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Dushore has been added to the caption.

[2] Stewart G. West ("West") filed a counterproposal requesting the allotment of Channel 233A to Dushore, Pennsylvania, as its first local FM service. However, West failed to serve a copy of his comments and counterproposal on the petitioner as required by Section 1.420 of the Commission's Rules and paragraph 4 of the Appendix to the *Notice* in this proceeding. Therefore, his counterproposal will not be considered. The opposition to West's proposal filed by WKGV/Anita L. Clark, West's response thereto, and the withdrawal of that opposition, are thus moot and will not be considered.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-160

In re Applications of

THE SERVANT MANAGEMENT GROUP, INC. (hereafter "Servant")	File No. BPH-880309MC
KMAS BROADCASTING CORPORATION (hereafter "KMAS")	File No. BPH-880310MB
CAMAS BROADCASTING COMPANY (hereafter "Camas")	File No. BPH-880310NB
LINDA C. AND WILLIAM H. BATTLES, JR. (hereafter "Battles")	File No. BPH-880310NC
ROBIN TOMPKINS (hereafter "Tompkins")	File No. BPH-880310NN

For Construction Permit
for a New FM Station on
Channel 234A in Camas, Washington

HEARING DESIGNATION ORDER

Adopted: March 8, 1990; Released: April 4, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary matters.* Servant and KMAS have indicated that their proposals will fail to provide the requisite 70 dBu signal over the entire community of license or maintain a direct line-of-sight between the proposed antenna and the community of licenses as required by 47 C.F.R. § 73.315(a) and (b). Servant indicates that its "unshadowed" contour would cover approximately 75% of the community of license and 90% of its population. KMAS indicates that its unshadowed contour would cover 78.5% of the community of license and 86.5% of its population (including the area of the Columbia River); and, 74.7% of the community of license and 86.5% of the population (excluding the area of the Columbia River). The engineering showing provided by each applicant demonstrates compliance with the Commission's city coverage requirements. Furthermore, line-of-sight coverage of the entire community of license in all cases is not an absolute requirement. *See e.g., Rush County Broadcasting Co., Inc.*, 26 FCC 2d 480 (1970). Adequate coverage may still be obtained from the diffracted signal. Here, we believe that adequate coverage of Camas will be provided by both Servant and KMAS. Accordingly, their waiver requests will be dismissed.

3. Our engineering study indicates that Tompkins' proposal may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that Tompkins may have failed to comply with the newly revised environmental criteria set forth in the Report and Order in Gen. Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the revised rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in the newly added 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in the newly revised 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since Tompkins' proposal may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, it will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. This study must include the cumulative effects of the proposed station and all nearby RF sources. In this regard, if the site is presently fenced in compliance with the guidelines, Tompkins is required to so state and give the distance from the base of the tower to the fence. Accordingly, Tompkins will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub non. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

4. *Servant.* Servant answered "no" to Item I, Section VI, FCC Form 301, which asks whether the applicant proposes to employ five or more fulltime employees. However, in its April 6, 1989 amendment to application, Servant answered "yes" to Item I, Section VI, FCC Form 301. If the applicant answers "yes" to this question, it must provide an EEO program called for in the Separate Model EEO Program (FCC 396-A). Servant failed to submit a Model EEO Program with its amendment. Servant will be required to amend its application within 30 days of the release of this Order to clear up this discrepancy in its response to Item I, Section VI, FCC Form 301.

5. *Camas.* The average of the eight radials listed in Section V-B, Item 19 of Camas' application equals 45.9 meters above average terrain (AAT). However, the height AAT listed in Item 7(b)(3) of Section V-B is 45 meters. While this inconsistency does not affect the tenderability or acceptability of Camas' application, Camas will be required to file an amendment correcting the problem.

6. Camas has indicated that its principals have interests in pending applications for Sacramento, California (BPH-871110MN); Elgin, Texas (BPH-871124MX); Eden Prairie, Minnesota (BPH-871203MC); Charleston, Indiana (BPH-880303MM); and Winton, California (BPH-880126ND). Camas informed the Commission in an amendment filed on June 6, 1989 that the Winton application had been granted. However, Camas neglected to inform the Commission of the subsequent designation of the application for Sacramento (MM Docket 89-543), nor did it advise the agency of the March 17, 1988 return of the Charleston application. Accordingly, Camas will be directed to file an amendment detailing the status of each of its other broadcast interests.

7. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Camas and Battles have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Camas and Battles would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

8. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
Servant	April 6, 1989 (engineering)
KMAS	February 6, 1989 (engineering); April 13, 1989
Camas	June 6, 1989; January 18, 1990
Tompkins	November 21, 1988

9. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. KMAS has not completed Item 4 correctly. KMAS' application gives a post office box number as the residence address for principal, Richard L. Schwary. Accordingly, KMAS must submit an amendment which gives all the information required by Section II, Item 4 to the presidingAdministrative Law Judge after this Order is released.

10. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

11. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Tompkins in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by Camas and Battles would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, That in light of the discussion in paragraph 2 above, the requests for waiver of 47 C.F.R. § 73.315(a) and (b) by Servant and KMAS ARE DISMISSED AS MOOT.

14. IT IS FURTHER ORDERED, That in accordance with paragraph 3 above, Tompkins shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

15. IT IS FURTHER ORDERED, That Servant shall provide the correct answer to Item I, Section VI, FCC Form 301 to the Presiding Administrative Law Judge within 30 days of the release of this Order.

16. IT IS FURTHER ORDERED, That Camas shall file the corrective amendment specified in paragraph 5 above with the presiding Administrative Law Judge within 30 days of the release of this Order.

17. IT IS FURTHER ORDERED, That Camas shall file an amendment updating the status of its other broadcast interests with the presiding Administrative Law Judge within 30 days of the release of this Order.

18. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Servant, KMAS, Camas and Tompkins ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

19. IT IS FURTHER ORDERED, That KMAS shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

20. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

21. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the

Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

22. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

23. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Matter of the Application of

JODY BARNES File No. 1163-CM-P-83

For Authority to Construct and Operate
a Multichannel Multipoint Distribution
Service Station on E-group Channels at
Toledo, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: March 28, 1990; Released: April 4, 1990

By the Chief, Domestic Facilities Division:

1. *Introduction*. The above-referenced application of Jody Barnes (Barnes) to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels to serve the Toledo, Ohio area was selected for qualification review as the result of a Commission lottery. Microband Corporation of America (Microband) and Continental Cablevision of Ohio, Inc. (Continental) filed post-lottery Petition to Deny,[1] challenging the application (collectively referred to as Petitioners). Barnes filed an Opposition to the Petition to Deny of Microband.

2. *Pleadings*. In separate Petitions, Microband and Continental allege that Barnes, together with eleven other MMDS applicants,[2] engaged in an orchestrated attempt to skew the Commission's lottery proceedings by the coordinated and systematic filing of virtually identical applications. Each of these applicants with the exception of Stephanie Engstrom, Theodore D. Little, and Kevin Rullman filed identical applications for Toledo. Microband and Continental contend that the events leading up to the filing of these "cookie-cutter" applications, the familial or business relationships among certain applicants, the central role that at least two of the applicants played in the preparation of the applications, and the similarities in technical and other information among the applications should lead the Commission to conclude that Barnes failed to disclose the identity of the real-parties-in-interest to her application in violation of Section 21.13(a) of the Commission's Rules, 47 C.F.R. § 21.13(a), and filed multiple applications in violation of Section 21.901(d)(2) of the Commission's Rules, 47 C.F.R. § 21.901(d)(2), also known as the one-to-a-market rule. Microband and Continental also contend that Barnes has not adequately demonstrated her financial qualifications to be an MMDS licensee in violation of Section 21.17 of the Commission's Rules, 47 C.F.R. § 21.17.

3. In her opposition, Barnes notes that Microband's Petition to Deny does "not contain a single affidavit in support of [Microband's] petition nor is there any proof or substantive evidence to substantiate [Microband's] allegations." Opposition at 2. Barnes relies upon her sworn affidavit to support her assertion that she has not violated the real-party-in-interest and one-to-a-market rules. Responding to the allegation that she failed to adequately demonstrate her financial qualifications to construct and operate the above-referenced MMDS station, Barnes submits an updated financial statement.

4. *Discussion*. The Court of Appeals for the District of Columbia Circuit in a recent line of cases clarified and reaffirmed the Commission's statutorily prescribed two-step process for determining the sufficiency of a petition to deny. *See, e.g., Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C.Cir. 1988)(hereinafter cited as *Beaumont*); *Gencom, Inc. v. FCC*, 832 F.2d 171 (D.C.Cir. 1987). It is well established in these cases that in order to obtain an evidentiary hearing, the proponent of a petition to deny must "first set forth specific allegations of fact sufficient to show . . . that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity." 47 U.S.C. § 309(d)(1). Second, if the petition meets these requirements, then and only then, must the Commission determine whether, on the basis of the application, the pleadings filed, or other matters which the Commission may officially notice, a substantial and material question of fact is presented. 47 U.S.C. § 309(d)(2). If no substantial or material question of fact is presented, no evidentiary hearing need be held. *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985)(hereinafter cited as *Jazz)*.

5. The *prima facie* sufficiency determination is to be made on the assumption that the specific facts set forth by the complaining party are true, and without reference to contrary evidence. *Id.* at 397. In other words, the Commission must perform this threshold inquiry on the basis of the petitioner's allegations alone. The Commission is limited to consideration of the petition and its supporting affidavits during this initial inquiry. *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C.Cir. 1988)(hereinafter cited as *Astroline)*. In the instant case, the petitioners allege the apparent existence of real-party-in-interest rule, one-to-the-market rule, and financial qualification violations. After consideration of the petitioners' allegations, as required under 47 U.S.C. 309(d)(1), we are persuaded that the asserted violations, standing alone, and, if assumed to be true, would sufficiently establish that grant of the subject application would be *prima facie* inconsistent with the public interest, convenience and necessity. Proof that Barnes failed to disclose the real-parties-in-interest and filed multiple applications would alter the Commision's public interest determination. *Astroline*, 857 F.2d at 1563, 1573; *see, e.g., David Lausisen and Broadcast Data Corp.*, 3 FCC Rcd 2053 (Comm. Car.Bur. 1988); *KIST Corp.*, 99 FCC 2d 173 (Rev. Bd. 1984), *aff'd as modified*, 102 FCC 2d 288 (1985), *aff'd sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C.Cir. 1986), *cert. denied*, 107 S.Ct. 2182 (1987); *Midland Educational Broadcasting Foundation*, 4 FCC Rcd 5207 (Audio Serv. Div. 1989).

6. Having found that the petitions to deny comport with the requirements enunciated at 47 U.S.C. § 309(d)(1), we now reach the question of the substantiality[3] or materiality of the facts presented as required by Section 309(d)(2). In determining whether an evidentiary hearing is warranted, the Commission considers the totality of the evidence presented (petitioner's evidence and facts offered in rebuttal). Petitioners' allegations with regard to violations of the real-party-in-interest and one-to-a-market rules are based upon the same circumstances,[4] therefore we will consider them together.

7. The test for determining whether a person is a real-party-in-interest[5] is whether that person has an ownership interest, or is or will be in a position, actually or potentially, to control the operation of the station. *San Joaquin Television Improvement Corp.*, 2 FCC Rcd 7004, 7008 (1987); *KOWL, Inc.*, 49 FCC 2d 962, 964 (Rev. Bd. 1974). The one-to-a-market rule prohibits, *inter alia*, the filing of multiple applications.[6] Petitioners' allegations of rule violations are based upon evidence that "cookie-cutter" applications were prepared and filed by a single group. However, it has been recognized that applications that are totally unrelated may be similar as a result of the coincidental use of common engineering and legal consultants. *Thomas Glab*, 5 FCC Rcd 516 (Dom. Fac. Div. 1990). In her Opposition, Barnes states in rebuttal:

> There were no agreements or understandings existent or under negotiation at the time of the filing of these applications which affected the ownership or control of the proposed facilities, or any right or interest therein by any person not a party to my application. In addition, there are no agreements or understandings regarding ownership or control at this time.

Opposition at 2. We find the petitioners' unsubstantiated evidence insufficient to establish the existence of a real-party-in-interest violation or a one-to-the-market rule violation in light of Barnes' rebuttal. *Sherry Rullman and Edna Cornaggia*, 2 FCC Rcd 2011 (1987); *Virginia Communications, Inc.*, 2 FCC Rcd 1895 (1987).

8. With regard to the petitioners' allegation that Barnes failed to adequately demonstrate her financial qualifications pursuant to Section 21.17, we note that since the petitions to deny were filed, the Commission revised rule Section 21.17 in *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713 (1987), to allow new applicants to submit a financial certification of their ability to meet estimated construction costs and the expenses of operating for a period of one year.[8] In that Rule Making order, the Commission stated:

> . . . In the NPRM we proposed to delete Section 21.17 because we believed that the requirement added to our regulatory burden and was a potential cause of unwarranted delay (for example when financial qualifications were unjustly challenged) without corresponding benefits to the public. . . . We conclude, therefore, that an attestation of the applicant's financial fitness is the most effective way of deterring speculative applications without burdening the applicants and the Commission staff with additional detailed information.

Id. at 5718-19.

> As discussed in paragraph 37, pending applications that will be granted after the new rules become effective will be treated as though they had been filed under the new rules. For those applications already containing financial data demonstrating financial ability to construct and operate the proposed facility, we will treat that information as if it were a certification of financial ability under the new rules. Only those applicants whose applications are deficient with regard to this information, and thus subject to dismissal, need file a financial certification statement, as prescribed by the new rules.

Id. at n. 57. Barnes' application is subject to this policy. Barnes will be required to file a financial certification within thirty (30) days of the release date of this order. Failure to submit the financial certification within thirty days may result in the dismissal of Barnes' application.

9. Having carefully considered all the pleadings and the evidence submitted by the parties, we find that Petitioners' allegations, when read in conjunction with the remainder of the record, are insufficient to raise a substantial or material question of fact.

10. *Ordering Clause*. Accordingly, IT IS ORDERED that the Petitions to Deny filed by Microband Corporation of America and Continental Cablevision of Ohio, Inc. ARE HEREBY DENIED. Further, Jody Barnes IS ORDERED to file a financial certification pursuant to 47 C.F.R. § 21.17 within thirty (30) days of the release date of this order.

11. This order is issued pursuant Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, or applications for review pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* Section 1.4(b)(2) of the Commission's Rules, 47 C.F.R. § 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] In its Petition to Deny, Microband incorporated by reference the pleadings it filed in *Sherry Rullman and Edna Cornaggia*, 2 FCC Rcd 2011 (1987).

[2] The eleven other applicants are Warren Ache, Edna Cornaggia, Stephanie Engstrom, Thomas Glab, Jack G. Hubbard, Joseph W. Hubbard, Theodore D. Little, Kevin Rullman, Sherry Rullman, Steven Rullman, and David Wiechman.

[3] A substantial fact has been defined as a fact for which "the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for." *Jazz*, 775 F.2d at 395.

[4] Microband argues that an undisclosed real-party-in-interest was the applicant for more than one MMDS application in Toledo. If true, there would exist violations of both of these rules. *David Laustsen and Broadcast Data Corp.*, 3 FCC Rcd at 2054.

[5] Section 21.13(a) of the Commission's Rules, 47 C.F.R. § 21.13(a), requires that an applicant must fully disclose the real-party-in-interest to the application.

[6] Section 21.901(d)(2) provides:

> The E-group channels will be assigned to a single applicant in each area and the F-group channels will be assigned to a different applicant in that area. In such areas, each applicant may submit only a single application for either the E-group channels or the F-group channels but not both. The partners, owners, trustees, beneficiaries, officers, directors or stockholders holding more than one percent of an entity's stock, or any other person or entity holding a similar cognizable interest in the applicant for, or the licensee of, one group of channels in any area, shall not have a cognizable interest in the applicant for, or licensee of, either the same group, or the other group of channels in the same area.

[7] We note that Microband and Continental failed to submit an affidavit to support its allegations pursuant to 47 U.S.C. § 309(d)(1). And, the petitioners did not provide the amount of specific facts to substantiate their allegations as provided by Astroline against the Arch transfer application in *Astroline*, 857 F.2d at 1556. A petition to deny "must show the necessary specificity and support; mere conclusory allegations are not suffficient." *Beaumont*, 854 F.2d at 507.

[8] It should be emphasized that the financial certification requirement does not abrogate the requirement that an applicant must demonstrate that it is financially qualified. However, the new Section 21.17 changes only the manner in which such demonstration is made.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Matter of the Application of

JODY BARNES File No. 1136-CM-P-83

For Authority to Construct and Operate
a Multichannel Multipoint Distribution
Service Station on E-group Channels at
Norfolk, Virginia

MEMORANDUM OPINION AND ORDER

Adopted: March 28, 1990; Released: April 4, 1990

By the Chief, Domestic Facilities Division:

1. *Introduction*. The above-referenced application of Jody Barnes (Barnes) to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels to serve the Norfolk, Virginia area was selected for qualification review as the result of a Commission lottery. Microband Corporation of America (Microband) filed a post-lottery Petition to Deny,[1] challenging the application. Barnes filed an Opposition to the Petition to Deny.

2. *Pleadings*. In its Petition, Microband alleges that Barnes, together with eleven other MMDS applicants,[2] engaged in an orchestrated attempt to skew the Commission's lottery proceedings by the coordinated and systematic filing of virtually identical applications. All twelve of these applicants filed applications for Norfolk. Microband contends that the events leading up to the filing of these "cookie-cutter" applications, the familial or business relationships among certain applicants, the central role that at least two of the applicants played in the preparation of the applications, and the similarities in technical and other information among the applications should lead the Commission to conclude that Barnes failed to disclose the identity of the real-parties-in-interest to her application in violation of Section 21.13(a) of the Commission's Rules, 47 C.F.R. § 21.13(a), and filed multiple applications in violation of Section 21.901(d)(2) of the Commission's Rules, 47 C.F.R. § 21.901(d)(2), also known as the one-to-a-market rule. Microband also contends that Barnes has not adequately demonstrated her financial qualifications to be an MMDS licensee in violation of Section 21.17 of the Commission's Rules, 47 C.F.R. § 21.17.

3. In her opposition, Barnes notes that Microband's Petition to Deny does "not contain a single affidavit in support of [Microband's] petition nor is there any proof or substantive evidence to substantiate [Microband's] allegations." Opposition at 2. Barnes relies upon her sworn affidavit to support her assertion that she has not violated the real-party-in-interest and one-to-a-market rules. Responding to the allegation that she failed to adequately demonstrate her financial qualifications to construct and operate the above-referenced MMDS station, Barnes submits an updated financial statement.

4. *Discussion*. The Court of Appeals for the District of Columbia Circuit in a recent line of cases clarified and reaffirmed the Commission's statutorily prescribed two-step process for determining the sufficiency of a petition to deny. *See, e.g., Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C.Cir. 1988)(hereinafter cited as *Beaumont*); *Gencom, Inc. v. FCC*, 832 F.2d 171 (D.C.Cir. 1987). It is well established in these cases that in order to obtain an evidentiary hearing, the proponent of a petition to deny must "first set forth specific allegations of fact sufficient to show . . . that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity." 47 U.S.C. § 309(d)(1). Second, if the petition meets these requirements, then and only then, must the Commission determine whether, on the basis of the application, the pleadings filed, or other matters which the Commission may officially notice, a substantial and material question of fact is presented. 47 U.S.C. § 309(d)(2). If no substantial or material question of fact is presented, no evidentiary hearing need be held. *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985)(hereinafter cited as *Jazz)*.

5. The *prima facie* sufficiency determination is to be made on the assumption that the specific facts set forth by the complaining party are true, and without reference to contrary evidence. *Id.* at 397. In other words, the Commission must perform this threshold inquiry on the basis of the petitioner's allegations alone. The Commission is limited to consideration of the petition and its supporting affidavits during this initial inquiry. *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C.Cir. 1988)(hereinafter cited as *Astroline)*. In the instant case, Microband alleges the apparent existence of real-party-in-interest rule, one-to-the-market rule, and financial qualification violations. After consideration of Microband's allegations, as required under 47 U.S.C. 309(d)(1), we are persuaded that the asserted violations, standing alone, and, if assumed to be true, would sufficiently establish that grant of the subject application would be *prima facie* inconsistent with the public interest, convenience and necessity. Proof that Barnes failed to disclose the real-parties-in-interest and filed multiple applications would alter the Commision's public interest determination. *Astroline*, 857 F.2d at 1563, 1573; *see, e.g., David Laustsen and Broadcast Data Corp.*, 3 FCC Rcd 2053 (Comm. Car.Bur. 1988); *KIST Corp.*, 99 FCC 2d 173 (Rev. Bd. 1984), *aff'd as modified*, 102 FCC 2d 288 (1985), *aff'd sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C.Cir. 1986), *cert. denied*, 107 S.Ct. 2182 (1987); *Midland Educational Broadcasting Foundation*, 4 FCC Rcd 5207 (Audio Serv. Div. 1989).

6. Having found that the petition to deny comports with the requirements enunciated at 47 U.S.C. § 309(d)(1), we now reach the question of the substantiality[3] or materiality of the facts presented as required by Section 309(d)(2). In determining whether an evidentiary hearing is warranted, the Commission considers the totality of the evidence presented (petitioner's evidence and facts offered in rebuttal). Microband's allegations with regard to violations of the real-party-in-interest and one-to-a-market rules are based upon the same circumstances,[4] therefore we will consider them together.

7. The test for determining whether a person is a real-party-in-interest[5] is whether that person has an ownership interest, or is or will be in a position, actually or potentially, to control the operation of the station. *San Joaquin*

Television Improvement Corp., 2 FCC Rcd 7004, 7008 (1987); *KOWL, Inc.*, 49 FCC 2d 962, 964 (Rev. Bd. 1974). The one-to-a-market rule prohibits, *inter alia*, the filing of multiple applications.[6] Microband's allegations of rule violations are based upon evidence that "cookie-cutter" applications were prepared and filed by a single group. However, it has been recognized that applications that are totally unrelated may be similar as a result of the coincidental use of common engineering and legal consultants.[7] *Thomas Glab*, 5 FCC Rcd 516 (Dom. Fac. Div. 1990). In her Opposition, Barnes states in rebuttal:

> There were no agreements or understandings existent or under negotiation at the time of the filing of these applications which affected the ownership or control of the proposed facilities, or any right or interest therein by any person not a party to my application. In addition, there are no agreements or understandings regarding ownership or control at this time.

Opposition at 2. We find Microband's unsubstantiated evidence insufficient to establish the existence of a real-party-in-interest violation or a one-to-the-market rule violation in light of Barnes' rebuttal. *Sherry Rullman and Edna Cornaggia*, 2 FCC Rcd 2011 (1987); *Virginia Communications, Inc.*, 2 FCC Rcd 1895 (1987).

8. With regard to Microband's allegation that Barnes failed to adequately demonstrate her financial qualifications pursuant to Section 21.17, we note that since Microband's petition to deny was filed, the Commission revised rule Section 21.17 in *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713 (1987), to allow new applicants to submit a financial certification of their ability to meet estimated construction costs and the expenses of operating for a period of one year.[8] In that Rule Making order, the Commission stated:

> . . . In the NPRM we proposed to delete Section 21.17 because we believed that the requirement added to our regulatory burden and was a potential cause of unwarranted delay (for example when financial qualifications were unjustly challenged) without corresponding benefits to the public. . . . We conclude, therefore, that an attestation of the applicant's financial fitness is the most effective way of deterring speculative applications without burdening the applicants and the Commission staff with additional detailed information.

Id. at 5718-19.

> As discussed in paragraph 37, pending applications that will be granted after the new rules become effective will be treated as though they had been filed under the new rules. For those applications already containing financial data demonstrating financial ability to construct and operate the proposed facility, we will treat that information as if it were a certification of financial ability under the new rules. Only those applicants whose applications are deficient with regard to this information, and thus subject to dismissal, need file a financial certification statement, as prescribed by the new rules.

Id. at n. 57. Barnes' application is subject to this policy. Barnes will be required to file a financial certification within thirty (30) days of the release date of this order. Failure to submit the financial certification within thirty days may result in the dismissal of Barnes' application.

9. Having carefully considered all the pleadings and the evidence submitted by the parties, we find that Microband's allegations, when read in conjunction with the remainder of the record, are insufficient to raise a substantial or material question of fact.

10. *Ordering Clause*. Accordingly, IT IS ORDERED that the Petition to Deny filed by Microband Corporation of America IS HEREBY DENIED. Further, Jody Barnes IS ORDERED to file a financial certification pursuant to 47 C.F.R. § 21.17 within thirty (30) days of the release date of this order.

11. This order is issued pursuant Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, or applications for review pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* Section 1.4(b)(2) of the Commission's Rules, 47 C.F.R. § 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] In its Petition to Deny, Microband incorporated by reference the pleadings it filed in *Sherry Rullman and Edna Cornaggia*, 2 FCC Rcd 2011 (1987).

[2] The eleven other applicants are Warren Ache, Edna Cornaggia, Stephanie Engstrom, Thomas Glab, Jack G. Hubbard, Joseph W. Hubbard, Theodore D. Little, Kevin Rullman, Sherry Rullman, Steven Rullman, and David Wiechman.

[3] A substantial fact has been defined as a fact for which "the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for." *Jazz*, 775 F.2d at 395.

[4] Microband argues that an undisclosed real-party-in-interest was the applicant for more than one MMDS application in Norfolk. If true, there would exist violations of both of these rules. *David Laustsen and Broadcast Data Corp.*, 3 FCC Rcd at 2054.

[5] Section 21.13(a) of the Commission's Rules, 47 C.F.R. § 21.13(a), requires that an applicant must fully disclose the real-party-in-interest to the application.

[6] Section 21.901(d)(2) provides:

> The E-group channels will be assigned to a single applicant in each area and the F-group channels will be assigned to a different applicant in that area. In such areas, each applicant may submit only a single application for either the E-group channels or the F-group channels but not both. The partners, owners, trustees, beneficiaries,

officers, directors or stockholders holding more than one percent of an entity's stock, or any other person or entity holding a similar cognizable interest in the applicant for, or the licensee of, one group of channels in any area, shall not have a cognizable interest in the applicant for, or licensee of, either the same group, or the other group of channels in the same area.

[7] We note that Microband failed to submit an affidavit to support its allegations pursuant to 47 U.S.C. § 309(d)(1). And, Microband did not provide the amount of specific facts to substantiate its allegations as provided by Astroline against the Arch transfer application in *Astroline*, 857 F.2d at 1556. A petition to deny "must show the necessary specificity and support; mere conclusory allegations are not suffficient." *Beaumont*, 854 F.2d at 507.

[8] It should be emphasized that the financial certification requirement does not abrogate the requirement that an applicant must demonstrate that it is financially qualified. However, the new Section 21.17 changes only the manner in which such demonstration is made.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Matter of the Application of

STEPHANIE ENGSTROM File No. 4225-CM-P-83

For Authority to Construct and Operate
a Multichannel Multipoint Distribution
Service Station on F-group Channels at
Spokane, Washington

MEMORANDUM OPINION AND ORDER

Adopted: March 28, 1990; Released: April 4, 1990

By the Chief, Domestic Facilities Division:

1. *Introduction*. The above-referenced application of Stephanie Engstrom (Engstrom) to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the F-group channels to serve the Spokane, Washington area was selected for qualification review as the result of a Commission lottery. Microband Corporation of America (Microband) filed a post-lottery Petition to Deny,[1] challenging the application. Engstrom filed an Opposition to the Petition to Deny.

2. *Pleadings*. In its Petition, Microband alleges that Engstrom, together with eleven other MMDS applicants,[2] engaged in an orchestrated attempt to skew the Commission's lottery proceedings by the coordinated and systematic filing of virtually identical applications. All twelve of these applicants, except Thomas Glab, filed applications for Spokane. Microband contends that the events leading up to the filing of these "cookie-cutter" applications, the familial or business relationships among certain applicants, the central role that at least two of the applicants played in the preparation of the applications, and the similarities in technical and other information among the applications should lead the Commission to conclude that Engstrom failed to disclose the identity of the real-parties-in-interest to her application in violation of Section 21.13(a) of the Commission's Rules, 47 C.F.R. § 21.13(a), and filed multiple applications in violation of Section 21.901(d)(2) of the Commission's Rules, 47 C.F.R. § 21.901(d)(2), also known as the one-to-a-market rule. Microband also contends that Engstrom has not adequately demonstrated her financial qualifications to be an MMDS licensee in violation of Section 21.17 of the Commission's Rules, 47 C.F.R. § 21.17.

3. In her opposition, Engstrom notes that Microband's Petition to Deny does "not contain a single affidavit in support of [Microband's] petition nor is there any proof or substantive evidence to substantiate [Microband's] allegations." Opposition at 1-2. Engstrom relies upon her sworn affidavit to support her assertion that she has not violated the real-party-in-interest and one-to-a-market rules. Responding to the allegation that she failed to adequately demonstrate her financial qualifications to construct and operate the above-referenced MMDS station, Engstrom submits an updated financial statement.

4. *Discussion*. The Court of Appeals for the District of Columbia Circuit in a recent line of cases clarified and reaffirmed the Commission's statutorily prescribed two-step process for determining the sufficiency of a petition to deny. *See, e.g., Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C.Cir. 1988)(hereinafter cited as *Beaumont*); *Gencom, Inc. v. FCC*, 832 F.2d 171 (D.C.Cir. 1987). It is well established in these cases that in order to obtain an evidentiary hearing, the proponent of a petition to deny must "first set forth specific allegations of fact sufficient to show . . . that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity." 47 U.S.C. § 309(d)(1). Second, if the petition meets these requirements, then and only then, must the Commission determine whether, on the basis of the application, the pleadings filed, or other matters which the Commission may officially notice, a substantial and material question of fact is presented. 47 U.S.C. § 309(d)(2). If no substantial or material question of fact is presented, no evidentiary hearing need be held. *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985)(hereinafter cited as *Jazz*).

5. The *prima facie* sufficiency determination is to be made on the assumption that the specific facts set forth by the complaining party are true, and without reference to contrary evidence. *Id.* at 397. In other words, the Commission must perform this threshold inquiry on the basis of the petitioner's allegations alone. The Commission is limited to consideration of the petition and its supporting affidavits during this initial inquiry. *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C.Cir. 1988)(hereinafter cited as *Astroline*). In the instant case, Microband alleges the apparent existence of real-party-in-interest rule, one-to-a-market rule, and financial qualification violations. After consideration of Microband's allegations, as required under 47 U.S.C. 309(d)(1), we are persuaded that the asserted violations, standing alone, and, if assumed to be true, would sufficiently establish that grant of the subject application would be *prima facie* inconsistent with the public interest, convenience and necessity. *Id.*, 857 F.2d at 1563, 1573; *Midland Educational Broadcasting Foundation*, 4 FCC Rcd 5207 (Audio Serv. Div. 1989). Proof that Engstrom failed to disclose the real-parties-in-interest and filed multiple applications would alter the Commission's public interest determination. *See, e.g., David Laustsen and Broadcast Data Corp.*, 3 FCC Rcd 2053 (Comm. Car.Bur. 1988); *KIST Corp.*, 99 FCC 2d 173 (Rev. Bd. 1984), *aff'd as modified*, 102 FCC 2d 288 (1985), *aff'd sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C.Cir. 1986), *cert. denied*, 107 S.Ct. 2182 (1987).

6. Having found that the petition to deny comports with the requirements enunciated at 47 U.S.C. § 309(d)(1), we now reach the question of the substantiality[3] or materiality of the facts presented as required by Section 309(d)(2). In determining whether an evidentiary hearing is warranted, the Commission considers the totality of the evidence presented (petitioner's evidence and facts offered in rebuttal). Microband's allegations with regard to violations of the real-party-in-interest and one-to-a-market rules are based upon the same circumstances,[4] therefore we will consider them together.

7. The test for determining whether a person is a real-party-in-interest[5] is whether that person has an ownership interest, or is or will be in a position, actually or potentially, to control the operation of the station. *San Joaquin*

Television Improvement Corp., 2 FCC Rcd 7004, 7008 (1987); *KOWL, Inc.*, 49 FCC 2d 962, 964 (Rev. Bd. 1974). The one-to-a-market rule prohibits, *inter alia*, the filing of multiple applications.[6] Microband's allegations of rule violations are based upon evidence that "cookie-cutter" applications were filed and prepared by a single group. However, it has been recognized that applications that are totally unrelated may be similar as a result of the coincidental use of common engineering and legal consultants.[7] *Thomas Glab*, 5 FCC Rcd 516 (Dom. Fac. Div. 1990). In her Opposition, Engstrom states in rebuttal:

> There were no agreements or understandings existent or under negotiation at the time of the filing of these applications which affected the ownership or control of the proposed facilities, or any right or interest therein by any person not a party to my application. In addition, there are no agreements or understandings regarding ownership or control at this time.

Opposition at 2. We find Microband's unsubstantiated evidence insufficient to establish the existence of a real-party-in-interest violation or a one-to-a-market rule violation in light of Engstrom's rebuttal. *Sherry Rullman and Edna Cornaggia*, 2 FCC Rcd 2011 (1987); *Virginia Communications, Inc.*, 2 FCC Rcd 1895 (1987).

8. With regard to Microband's allegation that Engstrom failed to adequately demonstrate her financial qualifications pursuant to Section 21.17, we note that since Microband's petition to deny was filed, the Commission revised rule Section 21.17 in *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713 (1987), to allow new applicants to submit a financial certification of their ability to meet estimated construction costs and the expenses of operating for a period of one year.[8] In that Rule Making order, the Commission stated:

> . . . In the NPRM we proposed to delete Section 21.17 because we believed that the requirement added to our regulatory burden and was a potential cause of unwarranted delay (for example when financial qualifications were unjustly challenged) without corresponding benefits to the public. . . . We conclude, therefore, that an attestation of the applicant's financial fitness is the most effective way of deterring speculative applications without burdening the applicants and the Commission staff with additional detailed information.

Id. at 5718-19.

> As discussed in paragraph 37, pending applications that will be granted after the new rules become effective will be treated as though they had been filed under the new rules. For those applications already containing financial data demonstrating financial ability to construct and operate the proposed facility, we will treat that information as if it were a certification of financial ability under the new rules. Only those applicants whose applications are deficient with regard to this information, and thus subject to dismissal, need file a financial certification statement, as prescribed by the new rules.

Id. at n. 57. Engstrom's application is subject to this policy. Engstrom will be required to file a financial certification within thirty (30) days of the release date of this order. Failure to submit the financial certification within thirty days may result in the dismissal of Engstrom's application.

9. Having carefully considered all the pleadings and the evidence submitted by the parties, we find that Microband's allegations, when read in conjunction with the remainder of the record, are insufficient to raise a substantial or material question of fact.

10. *Ordering Clause*. Accordingly, IT IS ORDERED that the Petition to Deny filed by Microband Corporation of America IS HEREBY DENIED. Further, Stephanie Engstrom IS ORDERED to file a financial certification pursuant to 47 C.F.R. § 21.17 within thirty (30) days of the release date of this order.

11. This order is issued pursuant Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, or applications for review pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* Section 1.4(b)(2) of the Commission's Rules, 47 C.F.R. § 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] In its Petition to Deny, Microband incorporated by reference the pleadings it filed in *Sherry Rullman and Edna Cornaggia*, 2 FCC Rcd 2011 (1987).

[2] The eleven other applicants are Warren Ache, Jody Barnes, Edna Cornaggia, Thomas Glab, Jack G. Hubbard, Joseph W. Hubbard, Theodore D. Little, Kevin Rullman, Sherry Rullman, Steven Rullman, and David Wiechman.

[3] A substantial fact has been defined as a fact for which "the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for." *Jazz*, 775 F.2d at 395.

[4] Microband argues that an undisclosed real-party-in-interest was the applicant for more than one MMDS application in Spokane. If true, there would exist violations of both of these rules. *David Laustsen and Broadcast Data Corp.*, 3 FCC Rcd at 2054.

[5] Section 21.13(a) of the Commission's Rules, 47 C.F.R. § 21.13(a), requires that an applicant must fully disclose the real-party-in-interest to the application.

[6] Section 21.901(d)(2) provides:

> The E-group channels will be assigned to a single applicant in each area and the F-group channels will be assigned to a different applicant in that area. In such areas, each applicant may submit only a single application for either the E-group channels or the F-group channels

but not both. The partners, owners, trustees, beneficiaries, officers, directors or stockholders holding more than one percent of an entity's stock, or any other person or entity holding a similar cognizable interest in the applicant for, or the licensee of, one group of channels in any area, shall not have a cognizable interest in the applicant for, or licensee of, either the same group, or the other group of channels in the same area.

[7] We note that Microband failed to submit an affidavit to support its allegations pursuant to 47 U.S.C. § 309(d)(1). And, Microband did not provide the amount of specific facts to substantiate its allegations as provided by Astroline against the Arch transfer application in *Astroline*, 857 F.2d at 1556. A petition to deny "must show the necessary specificity and support; mere conclusory allegations are not suffficient." *Beaumont*, 854 F.2d at 507.

[8] It should be emphasized that the financial certification requirement does not abrogate the requirement that an applicant must demonstrate that it is financially qualified. However, the new Section 21.17 changes only the manner in which such demonstration is made.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Matter of the Application of

STEPHANIE ENGSTROM File No. 4217-CM-P-83

For Authority to Construct and Operate
a Multichannel Multipoint Distribution
Service Station on F-group Channels at
Peoria, Illinois

MEMORANDUM OPINION AND ORDER

Adopted: March 28, 1990; Released: April 4, 1990

By the Chief, Domestic Facilities Division:

1. *Introduction*. The above-referenced application of Stephanie Engstrom (Engstrom) to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the F-group channels to serve the Peoria, Illinois area was selected for qualification review as the result of a Commission lottery. Microband Corporation of America (Microband) and UACC Midwest, Inc. (Midwest) filed post-lottery Petitions to Deny,[1] challenging the application (collectively referred to as Petitioners). Engstrom filed Oppositions to the Petitions to Deny.

2. *Pleadings*. In their Petitions, the Committee and Midwest allege that Engstrom, together with eleven other MMDS applicants,[2] engaged in an orchestrated attempt to skew the Commission's lottery proceedings by the coordinated and systematic filing of virtually identical applications. All twelve of these applicants filed applications for Peoria. Microband and Midwest contend that the events leading up to the filing of these "cookie-cutter" applications, the familial or business relationships among certain applicants, the central role that at least two of the applicants played in the preparation of the applications, and the similarities in technical and other information among the applications should lead the Commission to conclude that Engstrom failed to disclose the identity of the real-parties-in-interest to her application in violation of Section 21.13(a) of the Commission's Rules, 47 C.F.R. § 21.13(a), and filed multiple applications in violation of Section 21.901(d)(2) of the Commission's Rules, 47 C.F.R. § 21.901(d)(2), also known as the one-to-a-market rule. Microband and Midwest also contend that Engstrom has not adequately demonstrated her financial qualifications to be an MMDS licensee in violation of Section 21.17 of the Commission's Rules, 47 C.F.R. § 21.17.

3. In opposition, Engstrom notes that neither Petition to Deny contains a single affidavit in support or presents any proof or substantive evidence to substantiate the petitioners' allegations. Opposition to Microband at 2; Opposition to Midwest at 3. Engstrom relies upon her sworn affidavit to support her assertion that she has not violated the real-party-in-interest and one-to-a-market rules. Responding to the allegation that she failed to adequately demonstrate her financial qualifications to construct and operate the above-referenced MMDS station, Engstrom submits an updated financial statement.

4. *Discussion*. The Court of Appeals for the District of Columbia Circuit in a recent line of cases clarified and reaffirmed the Commission's statutorily prescribed two-step process for determining the sufficiency of a petition to deny. *See, e.g., Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C.Cir. 1988)(hereinafter cited as *Beaumont*); *Gencom, Inc. v. FCC*, 832 F.2d 171 (D.C.Cir. 1987). It is well established in these cases that in order to obtain an evidentiary hearing, the proponent of a petition to deny must "first set forth specific allegations of fact sufficient to show . . . that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity." 47 U.S.C. § 309(d)(1). Second, if the petition meets these requirements, then and only then, must the Commission determine whether, on the basis of the application, the pleadings filed, or other matters which the Commission may officially notice, a substantial and material question of fact is presented. 47 U.S.C. § 309(d)(2). If no substantial or material question of fact is presented, no evidentiary hearing need be held. *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985)(hereinafter cited as *Jazz*).

5. The *prima facie* sufficiency determination is to be made on the assumption that the specific facts set forth by the complaining party are true, and without reference to contrary evidence. *Id.* at 397. In other words, the Commission must perform this threshold inquiry on the basis of the petitioner's allegations alone. The Commission is limited to consideration of the petition and its supporting affidavits during this initial inquiry. *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C.Cir. 1988)(hereinafter cited as *Astroline*). In the instant case, Petitioners allege the apparent existence of real-party-in-interest, one-to-the-market, and financial qualification rule violations. After consideration of Petitioners' allegations, as required under 47 U.S.C. 309(d)(1), we are persuaded that the asserted violations, standing alone, and, if assumed to be true, would sufficiently establish that grant of the subject application would be *prima facie* inconsistent with the public interest, convenience and necessity. Proof that Engstrom failed to disclose the real-parties-in-interest and filed multiple applications would alter the Commision's public interest determination. *Astroline*, 857 F.2d at 1563, 1573; *see, e.g., David Laustsen and Broadcast Data Corp.*, 3 FCC Rcd 2053 (Comm. Car.Bur. 1988); *KIST Corp.*, 99 FCC 2d 173 (Rev. Bd. 1984), *aff'd as modified*, 102 FCC 2d 288 (1985), *aff'd sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C.Cir. 1986), *cert. denied*, 107 S.Ct. 2182 (1987); *Midland Educational Broadcasting Foundation*, 4 FCC Rcd 5207 (Audio Serv. Div. 1989).

6. Having found that the petitions to deny comport with the requirements enunciated at 47 U.S.C. § 309(d)(1), we now reach the question of the substantiality[3] or materiality of the facts presented as required by Section 309(d)(2). In determining whether an evidentiary hearing is warranted, the Commission considers the totality of the evidence presented (petitioner's evidence and facts offered in rebuttal). Microband's and Midwest's allegations with regard to violations of the real-party-in-interest and one-to-a-market rules are based upon the same circumstances,[4] therefore we will consider them together.

7. The test for determining whether a person is a real-party-in-interest[5] is whether that person has an ownership interest, or is or will be in a position, actually or potentially, to control the operation of the station. *San Joaquin Television Improvement Corp.*, 2 FCC Rcd 7004, 7008 (1987); *KOWL, Inc.*, 49 FCC 2d 962, 964 (Rev. Bd. 1974). The one-to-a-market rule prohibits, *inter alia*, the filing of multiple applications.[6] Petitioners' allegations of rule violations are based upon evidence that "cookie-cutter" applications were filed. However, it has been recognized that applications that are totally unrelated may be similar as a result of the coincidental use of common engineering and legal consultants.[7] *Thomas Glab*, 5 FCC Rcd 516 (Dom. Fac. Div. 1990). In her Opposition, Engstrom states in rebuttal:

> There were no agreements or understandings existent or under negotiation at the time of the filing of these applications which affected the ownership or control of the proposed facilities, or any right or interest therein by any person not a party to my application. In addition, there are no agreements or understandings regarding ownership or control at this time.

Opposition to Microband at 2. We find Petitioners' unsubstantiated evidence insufficient to establish the existence of a real-party-in-interest or a one-to-the-market rule violations in light of Engstrom's rebuttal. *Sherry Rullman and Edna Cornaggia*, 2 FCC Rcd 2011 (1987); *Virginia Communications, Inc.*, 2 FCC Rcd 1895 (1987).

8. With regard to Petitioners' allegation that Engstrom failed to adequately demonstrate her financial qualifications pursuant to Section 21.17, we note that since the petitions to deny were filed, the Commission revised rule Section 21.17 in *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713 (1987), to allow new applicants to submit a financial certification of their ability to meet estimated construction costs and the expenses of operating for a period of one year.[8] In that Rule Making order, the Commission stated:

> . . . In the NPRM we proposed to delete Section 21.17 because we believed that the requirement added to our regulatory burden and was a potential cause of unwarranted delay (for example when financial qualifications were unjustly challenged) without corresponding benefits to the public. . . . We conclude, therefore, that an attestation of the applicant's financial fitness is the most effective way of deterring speculative applications without burdening the applicants and the Commission staff with additional detailed information.

Id. at 5718-19.

> As discussed in paragraph 37, pending applications that will be granted after the new rules become effective will be treated as though they had been filed under the new rules. For those applications already containing financial data demonstrating financial ability to construct and operate the proposed facility, we will treat that information as if it were a certification of financial ability under the new rules. Only those applicants whose applications are deficient with regard to this information, and thus subject to dismissal, need file a financial certification statement, as prescribed by the new rules.

Id. at n. 57. Engstrom's application is subject to this policy. Engstrom will be required to file a financial certification within thirty (30) days of the release date of this order. Failure to submit the financial certification within thirty days may result in the dismissal of Engstrom's application.

9. Having carefully considered all the pleadings and the evidence submitted by the parties, we find that Microband's and Midwest's allegations, when read in conjunction with the remainder of the record, are insufficient to raise a substantial or material question of fact.

10. *Ordering Clause*. Accordingly, IT IS ORDERED that the Petitions to Deny filed by Microband Corporation of America and UACC Midwest, Inc. ARE HEREBY DENIED. Further, Stephanie Engstrom IS ORDERED to file a financial certification pursuant to 47 C.F.R. § 21.17 within thirty (30) days of the release date of this order.

11. This order is issued pursuant Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, or applications for review pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* Section 1.4(b)(2) of the Commission's Rules, 47 C.F.R. § 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] In its Petition to Deny, Microband incorporated by reference the pleadings it filed in *Sherry Rullman and Edna Cornaggia*, 2 FCC Rcd 2011 (1987).

[2] The eleven other applicants are Warren Ache, Jody Barnes, Edna Cornaggia, Thomas Glab, Jack G. Hubbard, Joseph W. Hubbard, Theodore D. Little, Kevin Rullman, Sherry Rullman, Steven Rullman, and David Wiechman.

[3] A substantial fact has been defined as a fact for which "the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for." *Jazz*, 775 F.2d at 395.

[4] Microband and Midwest argue that an undisclosed real-party-in-interest was the applicant for more than one MMDS application in Peoria. If true, there would exist violations of both of these rules. *David Laustsen and Broadcast Data Corp.*, 3 FCC Rcd at 2054.

[5] Section 21.13(a) of the Commission's Rules, 47 C.F.R. § 21.13(a), requires that an applicant must fully disclose the real-party-in-interest to the application.

[6] Section 21.901(d)(2) provides:

The E-group channels will be assigned to a single applicant in each area and the F-group channels will be assigned to a different applicant in that area. In such areas, each applicant may submit only a single application for either the E-group channels or the F-group channels but not both. The partners, owners, trustees, beneficiaries, officers, directors or stockholders holding more than one percent of an entity's stock, or any other person or entity holding a similar cognizable interest in the applicant for, or the licensee of, one group of channels in any area, shall not have a cognizable interest in the applicant for, or licensee of, either the same group, or the other group of channels in the same area.

[7] We note that Microband and Midwest failed to submit an affidavit to support their allegations pursuant to 47 U.S.C. § 309(d)(1). And, the petitioners did not provide the amount of specific facts to substantiate their allegations as provided by Astroline against the Arch transfer application in *Astroline*, 857 F.2d at 1556. A petition to deny "must show the necessary specificity and support; mere conclusory allegations are not suffficient." *Beaumont*, 854 F.2d at 507.

[8] It should be emphasized that the financial certification requirement does not abrogate the requirement that an applicant must demonstrate that it is financially qualified. However, the new Section 21.17 changes only the manner in which such demonstration is made.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Matter of the Application of

STEVEN RULLMAN File No. 12780-CM-P-83

For Authority to Construct and Operate
a Multichannel Multipoint Distribution
Service Station on F-group Channels at
Scranton, Pennsylvania

MEMORANDUM OPINION AND ORDER

Adopted: March 28, 1990; Released: April 4, 1990

By the Chief, Domestic Facilities Division:

1. *Introduction*. The above-referenced application of Steven Rullman (Rullman) to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the F-group channels to serve the Scranton, Pennsylvania area was selected for qualification review as the result of a Commission lottery. Microband Corporation of America (Microband) filed a post-lottery Petition to Deny,[1] challenging the application. Rullman filed an Opposition to the Petition to Deny.

2. *Pleadings*. In its Petition, Microband alleges that Rullman, together with eleven other MMDS applicants,[2] engaged in an orchestrated attempt to skew the Commission's lottery proceedings by the coordinated and systematic filing of virtually identical applications. All twelve of these applicants, except Stephanie Engstrom, Theodore D. Little, and Kevin Rullman, filed applications for Scranton. Microband contends that the events leading up to the filing of these "cookie-cutter" applications, the familial or business relationships among certain applicants, the central role that at least two of the applicants played in the preparation of the applications, and the similarities in technical and other information among the applications should lead the Commission to conclude that Rullman failed to disclose the identity of the real-parties-in-interest to his application in violation of Section 21.13(a) of the Commission's Rules, 47 C.F.R. § 21.13(a), and filed multiple applications in violation of Section 21.901(d)(2) of the Commission's Rules, 47 C.F.R. § 21.901(d)(2), also known as the one-to-a-market rule. Microband also contends that Rullman has not adequately demonstrated his financial qualifications to be an MMDS licensee in violation of Section 21.17 of the Commission's Rules, 47 C.F.R. § 21.17.

3. In his opposition, Rullman notes that Microband's Petition to Deny does "not contain a single affidavit in support of [Microband's] petition nor is there any proof or substantive evidence to substantiate [Microband's] allegations." Opposition at 2. Rullman relies upon his sworn affidavit to support his assertion that he has not violated the real-party-in-interest and one-to-a-market rules. Responding to the allegation that he failed to adequately demonstrate his financial qualifications to construct and operate the above-referenced MMDS station, Rullman submits updated financial statements for himself and his mother, Sherry Rullman, and his mother's promise to loan him the necessary funds.

4. *Discussion*. The Court of Appeals for the District of Columbia Circuit in a recent line of cases clarified and reaffirmed the Commission's statutorily prescribed two-step process for determining the sufficiency of a petition to deny. *See, e.g., Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C.Cir. 1988)(hereinafter cited as *Beaumont*); *Gencom, Inc. v. FCC*, 832 F.2d 171 (D.C.Cir. 1987). It is well established in these cases that in order to obtain an evidentiary hearing, the proponent of a petition to deny must "first set forth specific allegations of fact sufficient to show . . . that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity." 47 U.S.C. § 309(d)(1). Second, if the petition meets these requirements, then and only then, must the Commission determine whether, on the basis of the application, the pleadings filed, or other matters which the Commission may officially notice, a substantial and material question of fact is presented. 47 U.S.C. § 309(d)(2). If no substantial or material question of fact is presented, no evidentiary hearing need be held. *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985)(hereinafter cited as *Jazz*).

5. The *prima facie* sufficiency determination is to be made on the assumption that the specific facts set forth by the complaining party are true, and without reference to contrary evidence. *Id.* at 397. In other words, the Commission must perform this threshold inquiry on the basis of the petitioner's allegations alone. The Commission is limited to consideration of the petition and its supporting affidavits during this initial inquiry. *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C.Cir. 1988)(hereinafter cited as *Astroline*). In the instant case, Microband alleges the apparent existence of real-party-in-interest rule, one-to-the-market rule, and financial qualification violations. After consideration of Microband's allegations, as required under 47 U.S.C. 309(d)(1), we are persuaded that the asserted violations, standing alone, and, if assumed to be true, would sufficiently establish that grant of the subject application would be *prima facie* inconsistent with the public interest, convenience and necessity. Proof that Rullman failed to disclose the real-parties-in-interest and filed multiple applications would alter the Commision's public interest determination. *Astroline*, 857 F.2d at 1563, 1573; *see, e.g., David Lausisen and Broadcast Data Corp.*, 3 FCC Rcd 2053 (Comm. Car.Bur. 1988); *KIST Corp.*, 99 FCC 2d 173 (Rev. Bd. 1984), *aff'd as modified*, 102 FCC 2d 288 (1985), *aff'd sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C.Cir. 1986), *cert. denied*, 107 S.Ct. 2182 (1987); *Midland Educational Broadcasting Foundation*, 4 FCC Rcd 5207 (Audio Serv. Div. 1989).

6. Having found that the petition to deny comports with the requirements enunciated at 47 U.S.C. § 309(d)(1), we now reach the question of the substantiality[3] or materiality of the facts presented as required by Section 309(d)(2). In determining whether an evidentiary hearing is warranted, the Commission considers the totality of the evidence presented (petitioner's evidence and facts offered in rebuttal). Microband's allegations with regard to violations of the real-party-in-interest and one-to-a-market rules are based upon the same circumstances,[4] therefore we will consider them together.

7. The test for determining whether a person is a real-party-in-interest[5] is whether that person has an ownership interest, or is or will be in a position, actually or potentially, to control the operation of the station. *San Joaquin Television Improvement Corp.*, 2 FCC Rcd 7004, 7008 (1987); *KOWL, Inc.*, 49 FCC 2d 962, 964 (Rev. Bd. 1974). The one-to-a-market rule prohibits, *inter alia*, the filing of multiple applications.[6] Microband's allegations of rule violations are based upon evidence that "cookie-cutter" applications were prepared and filed. However, it has been recognized that applications totally unrelated may be similar as a result of the coincidental use of common engineering and legal consultants. [7] *Thomas Glab*, 5 FCC Rcd 516 (Dom. Fac. Div. 1990). In his Opposition, Rullman states in rebuttal:

> There were no agreements or understandings existent or under negotiation at the time of the filing of these applications which affected the ownership or control of the proposed facilities, or any right or interest therein by any person not a party to my application. In addition, there are no agreements or understandings regarding ownership or control at this time.

Opposition at 2. We find Microband's unsubstantiated evidence insufficient to establish the existence of a real-party-in-interest violation or a one-to-the-market rule violation in light of Rullman's rebuttal. *Sherry Rullman and Edna Cornaggia*, 2 FCC Rcd 2011 (1987); *Virginia Communications, Inc.*, 2 FCC Rcd 1895 (1987).

8. With regard to Microband's allegation that Rullman failed to adequately demonstrate his financial qualifications pursuant to Section 21.17, we note that since Microband's petition to deny was filed, the Commission revised rule Section 21.17 in *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713 (1987), to allow new applicants to submit a financial certification of their ability to meet estimated construction costs and the expenses of operating for a period of one year.[8] In that Rule Making order, the Commission stated:

> . . . In the NPRM we proposed to delete Section 21.17 because we believed that the requirement added to our regulatory burden and was a potential cause of unwarranted delay (for example when financial qualifications were unjustly challenged) without corresponding benefits to the public. . . . We conclude, therefore, that an attestation of the applicant's financial fitness is the most effective way of deterring speculative applications without burdening the applicants and the Commission staff with additional detailed information.

Id. at 5718-19.

> As discussed in paragraph 37, pending applications that will be granted after the new rules become effective will be treated as though they had been filed under the new rules. For those applications already containing financial data demonstrating financial ability to construct and operate the proposed facility, we will treat that information as if it were a certification of financial ability under the new rules. Only those applicants whose applications are deficient with regard to this information, and thus subject to dismissal, need file a financial certification statement, as prescribed by the new rules.

Id. at n. 57. Rullman's application is subject to this policy. Rullman will be required to file a financial certification within thirty (30) days of the release date of this order. Failure to submit the financial certification within thirty days may result in the dismissal of Rullman's application.

9. Having carefully considered all the pleadings and the evidence submitted by the parties, we find that Microband's allegations, when read in conjunction with the remainder of the record, are insufficient to raise a substantial or material question of fact.

10. *Ordering Clause*. Accordingly, IT IS ORDERED that the Petition to Deny filed by Microband Corporation of America IS HEREBY DENIED. Further, Steven Rullman IS ORDERED to file a financial certification pursuant to 47 C.F.R. § 21.17 within thirty (30) days of the release date of this order.

11. This order is issued pursuant Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, or applications for review pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* Section 1.4(b)(2) of the Commission's Rules, 47 C.F.R. § 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] In its Petition to Deny, Microband incorporated by reference the pleadings it filed in *Sherry Rullman and Edna Cornaggia*, 2 FCC Rcd 2011 (1987).

[2] The eleven other applicants are Warren Ache, Jody Barnes, Edna Cornaggia, Stephanie Engstrom, Thomas Glab, Jack G. Hubbard, Joseph W. Hubbard, Theodore D. Little, Kevin Rullman, Sherry Rullman, and David Wiechman.

[3] A substantial fact has been defined as a fact for which "the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for." *Jazz*, 775 F.2d at 395.

[4] Microband argues that an undisclosed real-party-in-interest was the applicant for more than one MMDS application in Scranton. If true, there would exist violations of both of these rules. *David Laustsen and Broadcast Data Corp.*, 3 FCC Rcd at 2054.

[5] Section 21.13(a) of the Commission's Rules, 47 C.F.R. § 21.13(a), requires that an applicant must fully disclose the real-party-in-interest to the application.

[6] Section 21.901(d)(2) provides:

> The E-group channels will be assigned to a single applicant in each area and the F-group channels will be assigned to a different applicant in that area. In such areas, each applicant may submit only a single application for either the E-group channels or the F-group channels but not both. The partners, owners, trustees, beneficiaries, officers, directors or stockholders holding more than one percent of an entity's stock, or any other person or entity holding a similar cognizable interest in the applicant for, or the licensee of, one group of channels in any area, shall not have a cognizable interest in the applicant for, or licensee of, either the same group, or the other group of channels in the same area.

[7] We note that Microband failed to submit an affidavit to support its allegations pursuant to 47 U.S.C. § 309(d)(1). And, Microband did not provide the amount of specific facts to substantiate its allegations as provided by Astroline against the Arch transfer application in *Astroline*, 857 F.2d at 1556. A petition to deny "must show the necessary specificity and support; mere conclusory allegations are not sufficient." *Beaumont*, 854 F.2d at 507.

[8] It should be emphasized that the financial certification requirement does not abrogate the requirement that an applicant must demonstrate that it is financially qualified. However, the new Section 21.17 changes only the manner in which such demonstration is made.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Matter of the Application of

WARREN ACHE File No. 58-CM-P-83

For Authority to Construct and Operate
a Multichannel Multipoint Distribution
Service Station on F-group Channels at
McAllen, Texas

MEMORANDUM OPINION AND ORDER

Adopted: March 29, 1990; Released: April 4, 1990

By the Chief, Domestic Facilities Division:

1. *Introduction*. The above-referenced application of Warren Ache (Ache) to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the F-group channels to serve the McAllen, Texas area was selected for qualification review as the result of a Commission lottery. Microband Corporation of America (Microband) filed a post-lottery Petition to Deny,[1] challenging the application. Ache filed an Opposition to the Petition to Deny.

2. *Pleadings*. In its Petition, Microband alleges that Ache, together with eleven other MMDS applicants,[2] engaged in an orchestrated attempt to skew the Commission's lottery proceedings by the coordinated and systematic filing of virtually identical applications. All twelve of these applicants filed applications for McAllen. Microband contends that the events leading up to the filing of these "cookie-cutter" applications, the familial or business relationships among certain applicants, the central role that at least two of the applicants played in the preparation of the applications, and the similarities in technical and other information among the applications should lead the Commission to conclude that Ache failed to disclose the identity of the real-parties-in-interest to his application in violation of Section 21.13(a) of the Commission's Rules, 47 C.F.R. § 21.13(a), and filed multiple applications in violation of Section 21.901(d)(2) of the Commission's Rules, 47 C.F.R. § 21.901(d)(2), also known as the one-to-a-market rule. Microband also contends that Ache has not adequately demonstrated his financial qualifications to be an MMDS licensee in violation of Section 21.17 of the Commission's Rules, 47 C.F.R. § 21.17.

3. In his opposition, Ache notes that Microband's Petition to Deny does "not contain a single affidavit in support of [Microband's] petition nor is there any proof or substantive evidence to substantiate [Microband's] allegations." Opposition at 2. Ache relies upon his sworn affidavit to support his assertion that he has not violated the real-party-in-interest and one-to-a-market rules. Responding to the allegation that he failed to adequately demonstrate his financial qualifications to construct and operate the above-referenced MMDS station, Ache submits an updated financial statement.

4. *Discussion*. The Court of Appeals for the District of Columbia Circuit in a recent line of cases clarified and reaffirmed the Commission's statutorily prescribed two-step process for determining the sufficiency of a petition to deny. *See, e.g., Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C.Cir. 1988)(hereinafter cited as *Beaumont)*; *Gencom, Inc. v. FCC*, 832 F.2d 171 (D.C.Cir. 1987). It is well established in these cases that in order to obtain an evidentiary hearing, the proponent of a petition to deny must "first set forth specific allegations of fact sufficient to show . . . that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity." 47 U.S.C. § 309(d)(1). Second, if the petition meets these requirements, then and only then, must the Commission determine whether, on the basis of the application, the pleadings filed, or other matters which the Commission may officially notice, a substantial and material question of fact is presented. 47 U.S.C. § 309(d)(2). If no substantial or material question of fact is presented, no evidentiary hearing need be held. *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985)(hereinafter cited as *Jazz)*.

5. The *prima facie* sufficiency determination is to be made on the assumption that the specific facts set forth by the complaining party are true, and without reference to contrary evidence. *Id.* at 397. In other words, the Commission must perform this threshold inquiry on the basis of the petitioner's allegations alone. The Commission is limited to consideration of the petition and its supporting affidavits during this initial inquiry. *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C.Cir. 1988)(hereinafter cited as *Astroline)*. In the instant case, Microband alleges the apparent existence of real-party-in-interest rule, one-to-the-market rule, and financial qualification violations. After consideration of Microband's allegations, as required under 47 U.S.C. 309(d)(1), we are persuaded that the asserted violations, standing alone, and, if assumed to be true, would sufficiently establish that grant of the subject application would be *prima facie* inconsistent with the public interest, convenience and necessity. Proof that Ache failed to disclose the real-parties-in-interest and filed multiple applications would alter the Commision's public interest determination. *Astroline*, 857 F.2d at 1563, 1573; *see, e.g., David Laustsen and Broadcast Data Corp.*, 3 FCC Rcd 2053 (Comm. Car.Bur. 1988); *KIST Corp.*, 99 FCC 2d 173 (Rev. Bd. 1984), *aff'd as modified*, 102 FCC 2d 288 (1985), *aff'd sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C.Cir. 1986), *cert. denied*, 107 S.Ct. 2182 (1987); *Midland Educational Broadcasting Founda - tion*, 4 FCC Rcd 5207 (Audio Serv. Div. 1989).

6. Having found that the petition to deny comports with the requirements enunciated at 47 U.S.C. § 309(d)(1), we now reach the question of the substantiality[3] or materiality of the facts presented as required by Section 309(d)(2). In determining whether an evidentiary hearing is warranted, the Commission considers the totality of the evidence presented (petitioner's evidence and facts offered in rebuttal). Microband's allegations with regard to violations of the real-party-in-interest and one-to-a-market rules are based upon the same circumstances,[4] therefore we will consider them together.

7. The test for determining whether a person is a real-party-in-interest[5] is whether that person has an ownership interest, or is or will be in a position, actually or potentially, to control the operation of the station. *San Joaquin*

Television Improvement Corp., 2 FCC Rcd 7004, 7008 (1987); *KOWL, Inc.*, 49 FCC 2d 962, 964 (Rev. Bd. 1974). The one-to-a-market rule prohibits, *inter alia*, the filing of multiple applications.[6] Microband's allegations of rule violations are based upon evidence that "cookie-cutter" applications were prepared and filed by a single group. However, it has been recognized that applications that are totally unrelated may be similar as a result of the coincidental use of common engineering and legal consultants.[7] *Thomas Glab*, 5 FCC Rcd 516 (Dom. Fac. Div. 1990). In his Opposition, Ache states in rebuttal:

> There were no agreements or understandings existent or under negotiation at the time of the filing of these applications which affected the ownership or control of the proposed facilities, or any right or interest therein by any person not a party to my application. In addition, there are no agreements or understandings regarding ownership or control at this time.

Opposition at 2. We find Microband's unsubstantiated evidence insufficient to establish the existence of a real-party-in-interest violation or a one-to-the-market rule violation in light of Ache's rebuttal. *Sherry Rullman and Edna Cornaggia*, 2 FCC Rcd 2011 (1987); *Virginia Communications, Inc.*, 2 FCC Rcd 1895 (1987).

8. With regard to Microband's allegation that Ache failed to adequately demonstrate his financial qualifications pursuant to Section 21.17, we note that since Microband's petition to deny was filed, the Commission revised rule Section 21.17 in *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713 (1987), to allow new applicants to submit a financial certification of their ability to meet estimated construction costs and the expenses of operating for a period of one year.[8] In that Rule Making order, the Commission stated:

> . . . In the NPRM we proposed to delete Section 21.17 because we believed that the requirement added to our regulatory burden and was a potential cause of unwarranted delay (for example when financial qualifications were unjustly challenged) without corresponding benefits to the public. . . . We conclude, therefore, that an attestation of the applicant's financial fitness is the most effective way of deterring speculative applications without burdening the applicants and the Commission staff with additional detailed information.

Id. at 5718-19.

> As discussed in paragraph 37, pending applications that will be granted after the new rules become effective will be treated as though they had been filed under the new rules. For those applications already containing financial data demonstrating financial ability to construct and operate the proposed facility, we will treat that information as if it were a certification of financial ability under the new rules. Only those applicants whose applications are deficient with regard to this information, and thus subject to dismissal, need file a financial certification statement, as prescribed by the new rules.

Id. at n. 57. Ache's application is subject to this policy. Ache will be required to file a financial certification within thirty (30) days of the release date of this order. Failure to submit the financial certification within thirty days may result in the dismissal of Ache's application.

9. Having carefully considered all the pleadings and the evidence submitted by the parties, we find that Microband's allegations, when read in conjunction with the remainder of the record, are insufficient to raise a substantial or material question of fact.

10. *Ordering Clauses*. Accordingly, IT IS ORDERED that the Petition to Deny filed by Microband Corporation of America IS HEREBY DENIED. Further, Warren Ache IS ORDERED to file a financial certification pursuant to 47 C.F.R. § 21.17 within thirty (30) days of the release date of this order.

11. This order is issued pursuant Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, or applications for review pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* Section 1.4(b)(2) of the Commission's Rules, 47 C.F.R. § 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] In its Petition to Deny, Microband incorporated by reference the pleadings it filed in *Sherry Rullman and Edna Cornaggia*, 2 FCC Rcd 2011 (1987).

[2] The eleven other applicants are Jody Barnes, Edna Cornaggia, Stephanie Engstrom, Thomas Glab, Jack G. Hubbard, Joseph W. Hubbard, Theodore D. Little, Kevin Rullman, Sherry Rullman, Steven Rullman, and David Wiechman.

[3] A substantial fact has been defined as a fact for which "the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for." *Jazz*, 775 F.2d at 395.

[4] Microband argues that an undisclosed real-party-in-interest was the applicant for more than one MMDS application in McAllen. If true, there would exist violations of both of these rules. *David Laustsen and Broadcast Data Corp.*, 3 FCC Rcd at 2054.

[5] Section 21.13(a) of the Commission's Rules, 47 C.F.R. § 21.13(a), requires that an applicant must fully disclose the real-party-in-interest to the application.

[6] Section 21.901(d)(2) provides:

> The E-group channels will be assigned to a single applicant in each area and the F-group channels will be assigned to a different applicant in that area. In such areas, each applicant may submit only a single application for either the E-group channels or the F-group channels but not both. The partners, owners, trustees, beneficiaries,

officers, directors or stockholders holding more than one percent of an entity's stock, or any other person or entity holding a similar cognizable interest in the applicant for, or the licensee of, one group of channels in any area, shall not have a cognizable interest in the applicant for, or licensee of, either the same group, or the other group of channels in the same area.

[7] We note that Microband failed to submit an affidavit to support its allegations pursuant to 47 U.S.C. § 309(d)(1). And, Microband did not provide the amount of specific facts to substantiate its allegations as provided by Astroline against the Arch transfer application in *Astroline*, 857 F.2d at 1556. A petition to deny "must show the necessary specificity and support; mere conclusory allegations are not suffficient." *Beaumont*, 854 F.2d at 507.

[8] It should be emphasized that the financial certification requirement does not abrogate the requirement that an applicant must demonstrate that it is financially qualified. However, the new Section 21.17 changes only the manner in which such demonstration is made.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Matter of the Application of

STEPHEN COMMUNICATIONS, INC. File No. 13602-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service Station on E-group Channels at Little Rock, Arkansas

MEMORANDUM OPINION AND ORDER

Adopted: March 29, 1990; Released: April 4, 1990

By the Chief, Domestic Facilities Division:

1. *Introduction*. The above-referenced application of Stephen Communications (Stephen) to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels to serve the Little Rock, Arkansas area was selected for qualification review as the result of a Commission lottery. The Committee for Fair MDS Lotteries (Committee) filed a post-lottery Petition to Deny,[1] challenging the application. Stephen filed a Reply.

2. *Pleadings*. In its Petition, the Committee alleges that Stephen, together with fifteen other MMDS applicants,[2] engaged in an orchestrated attempt to skew the Commission's lottery proceedings by the coordinated and systematic filing of virtually identical applications under different corporate names. All sixteen of these applicants filed applications for Little Rock. The Committee contends that the events leading up to the filing of these "cookie-cutter" applications,[3] the familial[4] or business relationships among certain applicants, the preparation of the applications under the direction and at the expense of Bruce Merrill,[5] and the similarities in technical and other information among the applications, and the Letter of Understanding between Stephen and Bruce Merrill[6] should lead the Commission to conclude that Stephen failed to disclose the identity of the real-party-in interest to its application in violation of Section 21.13(a) of the Commission's Rules, 47 C.F.R. § 21.13(a). In addition, the Committee alleges these same facts demonstrate that Stephen filed multiple applications in violation of Section 21.901(d)(2) of the Commission's Rules, 47 C.F.R. § 21.901(d)(2), also known as the one-to-a-market rule. The Committee also contends that Stephen failed to disclose its affiliation or relationship to its intended or likely subscriber, Bruce Merrill, in violation of Section 21.900 of the Commission's Rules, 47 C.F.R. § 21.900.

3. In its Reply, Stephen argues that it has not violated the real-party-in-interest and one-to-a-market rules because no one other than Stephen Merrill owns or controls any interest in Stephen. Reply at 6.

4. *Discussion*. The Court of Appeals for the District of Columbia Circuit in a recent line of cases clarified and reaffirmed the Commission's statutorily prescribed two-step process for determining the sufficiency of a petition to deny. *See, e.g., Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C.Cir. 1988)(hereinafter cited as *Beaumont)*; *Gencom, Inc. v. FCC*, 832 F.2d 171 (D.C.Cir. 1987). It is well established in these cases that in order to obtain an evidentiary hearing, the proponent of a petition to deny must "first set forth specific allegations of fact sufficient to show . . . that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity." 47 U.S.C. § 309(d)(1). Second, if the petition meets these requirements, then and only then, must the Commission determine whether, on the basis of the application, the pleadings filed, or other matters which the Commission may officially notice, a substantial and material question of fact is presented. 47 U.S.C. § 309(d)(2). If no substantial or material question of fact is presented, no evidentiary hearing need be held. *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985)(hereinafter cited as *Jazz)*.

5. The *prima facie* sufficiency determination is to be made on the assumption that the specific facts set forth by the complaining party are true, and without reference to contrary evidence. *Id.* at 397. In other words, the Commission must perform this threshold inquiry on the basis of the petitioner's allegations alone. The Commission is limited to consideration of the petition and its supporting affidavits during this initial inquiry. *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C.Cir. 1988)(hereinafter cited as *Astroline)*. In the instant case, the Committee alleges the apparent existence of real-party-in-interest rule, one-to-the-market rule, and affiliation disclosure violations. After consideration of the Committee's allegations, as required under 47 U.S.C. 309(d)(1), we are persuaded that the asserted violations, standing alone, and, if assumed to be true, would sufficiently establish that grant of the subject application would be *prima facie* inconsistent with the public interest, convenience and necessity. *Id.*, 857 F.2d at 1563, 1573; *see also, Midland Educational Broadcasting Foundation*, 4 FCC Rcd 5207 (Audio Serv. Div. 1989). Proof that Stephen failed to disclose the real-party-in-interest and filed multiple applications would alter the Commission's public interest determination. *See, e.g., David Lawrsen and Broadcast Data Corp.*, 3 FCC Rcd 2053 (Comm. Car.Bur. 1988); *KIST Corp.*, 99 FCC 2d 173 (Rev. Bd. 1984), *aff'd as modified*, 102 FCC 2d 288 (1985), *aff'd sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C.Cir. 1986), *cert. denied*, 107 S.Ct. 2182 (1987).

6. Having found that the petition to deny comports with the requirements enunciated at 47 U.S.C. § 309(d)(1), we now reach the question of the substantiality or materiality of the facts presented as required by Section 309(d)(2). In determining whether an evidentiary hearing is warranted, the Commission considers the totality of the evidence presented (petitioner's evidence and facts offered in rebuttal). The Committee's allegations with regard to violations of the real-party-in-interest and one-to-a-market rules are based upon the same circumstances,[8] therefore we will consider them together.

7. The test for determining whether a person is a real-party-in-interest[9] is whether that person has an ownership interest, or is or will be in a position, actually or potentially, to control the operation of the station. *San Joaquin*

Television Improvement Corp., 2 FCC Rcd 7004, 7008 (1987); *KOWL, Inc.*, 49 FCC 2d 962, 964 (Rev. Bd. 1974). The one-to-a-market rule prohibits, *inter alia*, the filing of multiple applications.[10] The Committee's allegations of rule violations are based upon evidence that Bruce Merrill directed the preparation of and paid for "cookie-cutter" applications that were filed. A substantial fact has been defined as a fact for which "the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for." *Jazz*, 775 F.2d at 395. However,"[t]here is no indication in the record that [Bruce] Merrill has any financial interest or reponsibility for any of the applicatons." *VCI*, 2 FCC Rcd at 1898. Stephen asserts that "no one other than Stephen Merrill has ever had an ownership interest in [Stephen]. Furthermore, no one but Stephen Merrill is or will be in a position to actually or potentially control the operation of [Stephen's] proposed MMDS facilities." Reply at 14. We find the Committee's unsubstantiated evidence insufficient to establish the existence of a real-party-in-interest violation or a one-to-the-market rule violation in light of Stephen's rebuttal. *VCI*, 2 FCC Rcd 1895 (1987); *Sherry Rullman and Edna Cornaggia*, 2 FCC Rcd 2011 (1987).

8. The Committee also alleges that Stephen violated the affiliation disclosure provision of Section 21.900 because it failed to submit a statement disclosing the affiliation or relationship between Stephen and Bruce Merrill, an intended or likely subscriber. We note that at the time Stephen initially filed its application, the application disclosed the fact that Bruce Merrill would be the intended or likely subscriber for Stephen's MMDS station in Little Rock. Stephen argues that there was no need to submit an affiliation statement pursuant to Section 21.900 because his relationship with Bruce Merrill is not financial or business related, but is familial. The terms "affiliation or relationship" have been defined for purposes of Section 21.900 as any financial or business relationship whatsoever by contract or otherwise, directly or indirectly, between the carrier and the subscriber, excepting only the carrier-user relationship. *Amendment of Parts 1, 2, 21 and 43 of the Commission's Rules and Regulations to provide for Licensing and Regulation of Common Carrier Radio Stations in the Multipoint Distribution Service*, 45 FCC 2d 616, 618 (1974). Therefore, we find that there is no substantial or material question of fact which requires an evidentiary hearing with regard to violation of the affiliation disclosure provisions of Section 21.900.

9. In *VCI*, 2 FCC Rcd at 1900, the Commission found that the Letter of Understanding between Bruce Merrill and Stephen "raises questions concerning the applicant's intent to comply with Title II of the Communications Act." *See* 47 U.S.C. § 202(a); *see also* 47 U.S.C. § 201. Stephen is reminded that the Commission imposed in that order a condition on any MMDS authorization Stephen obtains requiring an offering to the public without unreasonable preference or discrimination for sixty days. "During that 60 day period, [Stephen] may not accept Bruce Merrill, MerrillCom, or any entity in which Bruce Merrill is affiliated as a customer-programmer." *Id.*

10. Having carefully considered all the pleadings and the evidence submitted by the parties, we find that the allegations raised by the Committee when read in conjunction with the remainder of the record, are insufficient to raise a substantial or material question of fact.

11. *Ordering Clause*. Accordingly, IT IS ORDERED that the Petition to Deny filed by The Committee for Fair MDS Lotteries IS HEREBY DENIED. This order is issued pursuant Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, or applications for review pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, may be filed within thirty (30) days of the date of Section 1.4(b)(2) of the Commission's Rules, 47 C.F.R. § 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] In its Petition to Deny, the Committee cites the pleadings filed in *Virginia Communications, Inc.*, 2 FCC Rcd 1895(1987)(hereinafter cited as *VCI*).

[2] The fifteen other applicants are B.F. Investments, Inc., Champion Industries, Inc., Fortuna Systems Corp., Line of Site, Inc., Mettler Communications, Inc., Microwave Video Services, Inc., Multi-Micro, Multi-Point Television Distributors, Inc., MWTV, Inc., Paul Communications, Inc., Presco Corporation, Video/Multipoint, Inc., Virginia Communications, Inc., Walter Communications, Inc. and Wireless Services, Inc.

[3] The Committee asserts that Bruce Merrill instigated Stephen's MMDS application submission, citing Bruce Merrill's statement that "[s]ince a lottery system was proposed . . . it would be better for various members of the family to file their applications independent of each other." Petition at 17.

[4] Bruce Merrill is the father of Stephen Merrill, the president and 100% stockholder of Stephen Communications, Inc.

[5] The Committee claims that Stephen may have lacked sufficient funds to pay for the preparation and filing of its MMDS applications. Petition at 17, n. 41.

[6] This Letter of Understanding states that Bruce Merrill, through his company, MerrillCom, will provide programming services to Stephen, if it is a successful MMDS applicant, in consideration of the pre-filing services performed by Bruce Merrill.

[7] A substantial fact has been defined as a fact for which "the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for." *Jazz*, 775 F.2d at 395.

[8] The Committee argues that Bruce Merrill, through his company, MerrillCom, as an undisclosed real-party-in-interest was the applicant for more than one MMDS application in Little Rock. If true, there would exist violations of both of these rules. *David Laustsen and Broadcast Data Corp.*, 3 FCC Rcd at 2054.

[9] Section 21.13(a) of the Commission's Rules, 47 C.F.R. § 21.13(a), requires that an applicant must fully disclose the real-party-in-interest to the application.

[10] Section 21.901(d)(2) provides:

The E-group channels will be assigned to a single applicant in each area and the F-group channels will be assigned to a different applicant in that area. In such areas, each applicant may submit only a single application for either the E-group channels or the F-group channels but not both. The partners, owners, trustees, beneficiaries, officers, directors or stockholders holding more than one percent of an entity's stock, or any other person or entity holding a similar cognizable interest in the applicant for, or the licensee of, one group of channels in any area, shall not have a cognizable interest in the applicant for, or licensee of, either the same group, or the other group of channels in the same area.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE HAWAIIAN
TELEPHONE, CO.

Application for authority to construct and operate international multipurpose earth station (15.5-meter) facilities at Ewa, Oahu, Hawaii — File No. CSG-90-019-P/L

Application for authority to construct and operate international earth station (13-meter) facilities at Ewa Oahu, Hawaii for the provision of INTELSAT Business Service. — File No. CSG-90-020-P/L

Application for authority to establish channels of communication between the earth station facilities at Ewa, Oahu, Hawaii and INTELSAT satellites for the provision of international digital services and to acquire and operate additional facilities for authorized services between Hawaii and various overseas points. — File No. I-T-C-90-037

ORDER AND AUTHORIZATION

Adopted: March 27, 1990; Released: April 4, 1990

By the Chief, International Facilities Division:

1. The above-captioned applications, filed on December 6, 1989 by GTE Hawaiian Telephone Co. (HTC), request authority, pursuant to Title III and Section 214 of the Communications Act of 1934, as amended, and Section 201 (c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, as amended, to construct and operate two international earth station antennas at Ewa, Oahu, Hawaii and establish channels of communication between these facilities and INTELSAT Pacific Ocean Region (POR) satellites for the provision of various international digital services. Further, HTC requests authority to acquire and operate additional satellite facilities for authorized services between Hawaii and various overseas points in the Pacific Ocean Region. The applications were placed on public notice on January 10 and 17, 1990. No comments were received.

2. The proposed earth station facilities shall consist of one 15.5-meter antenna meeting INTELSAT Revised Standard A technical parameters and one 13-meter antenna meeting INTELSAT Standard B technical parameters and communicate with INTELSAT POR satellites in the 5925-6425 MHz transmitting frequency band and the 3700-4200 MHz receiving frequency band. The two earth station facilities will be constructed at Ewa, Oahu, Hawaii and will be used to provide various international digital services between Hawaii and those countries served by INTELSAT POR satellites that are or may be listed in Comsat's Digital Services tariff. The Standard A earth station shall be used to provide international message telephone service (IMTS) using Intermediate Data Rate (IDR) facilities and the Standard B earth station shall provide INTELSAT Business Services (IBS). HTC proposes to transfer its existing IMTS circuits currently operating out of the GTE Spacenet Sunset Beach earth station to the proposed IDR facilities to communicate with foreign IDR earth stations facilities.

3. In its Report and Order in the *Earth Station Ownership Proceeding*, CC Docket No. 82-540, the Commission established a more open and flexible earth station policy which allowed entities other than the Earth Station Ownership Committee (ESOC) to own and operate international earth stations that access the INTELSAT system. The Order permitted the joint carrier[1] owners of ESOC earth stations to decide among themselves the future of ESOC. The Commission also concluded that when reviewing applications for these international earth stations, it would distinguish between earth stations dedicated to providing IBS and/or television services and multipurpose stations. IBS and/or television earth stations, the Commission found, do not have the same potential for revenue diversion and significant impact on system efficiency as multipurpose earth stations. Consequently, the Commission concluded that it would consider only the minimal legal, financial and technical qualifications of the applicant as required by Sections 308 and 319 of the Communications Act of 1934, as amended, when reviewing applications for IBS and/or television earth stations. Absent special problems, the Commission stated that it would treat these applications as routine and process them expeditiously.

4. With respect to multipurpose stations, the Commission stated that it would continue close scrutiny of applications for construction and operation of these facilities since they tend to raise more complex economic, technical and operational issues that may affect the variety, quality and price of service offered to users. In determining whether the grant of an application for a multipurpose earth station will serve the public interest, the Commission indicated it would conduct an analysis by balancing the possible benefits (*e.g.*, shorter terrestrial hauls, increased user options, lower charges to users, and increased customer base for INTELSAT services) against the possible detriments (*e.g.*, reduced technical efficiency, harmful revenue diversion, service deterioration and higher charges to users) which a particular application may present.[2] However, with the dissolution of ESOC earth station ownership arrangements and the transition to a competitive environment, the issue of harmful revenue diversion from existing ESOC earth stations is no longer a concern.

5. HTC's legal, technical and financial qualifications to construct and operate the two proposed earth station facilities are established. HTC provides many types of communications services, both domestic and international. The two proposed earth station facilities conform with INTELSAT performance criteria for Standard A and B earth stations, respectively. HTC has completed the necessary frequency coordination.

6. Upon consideration of the applications, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

7. Accordingly, IT IS ORDERED that applications File Nos. CSG-90-019-P/L, CSG-90-020-P/L and I-T-C-90-037 ARE GRANTED and HTC is authorized to:

a. construct and operate a 15.5-meter multipurpose INTELSAT Standard A earth station at Ewa, Oahu, Hawaii for the provision of international message telephone services using IDR[3];

b. construct and operate a 13-meter INTELSAT Standard B earth station at Ewa, Oahu, Hawaii for the provision of IBS and related digital video services;

c. establish channels of communication between the facilities in paragraphs a and b above and INTELSAT Pacific Ocean Region Satellites to provide HTC's regularly authorized international digital services as authorized in this order;

d. activate the ground segment capacity at the Ewa earth stations and acquire the radio-frequency (RF) portion of ground segment capacity from GTE Spacenet at the Sunset earth station and acquire space segment capacity from Comsat and operate the number of satellite circuits to each point specified in the attached Appendix between the appropriate earth stations in Hawaii and appropriate INTELSAT satellite(s) over the Pacific Ocean, connecting with similar circuits between the satellite(s) and the earth stations specified in the Appendix, furnished by HTC's overseas correspondents;

e. lease and operate a greater or lesser number of satellite circuits to each point listed in the Appendix, but not to exceed a total of 341 circuits in 1990, 377 circuits in 1991 and 424 circuits in 1992; and

f. use the facilities specified in paragraphs d and e above to provide HTC's regularly authorized services between Hawaii and the points specified in the attached Appendix and beyond.

8. All previous authorizations for satellite facilities to the points specified are hereby superseded.

9. HTC shall file a new application for service and facility to points in the Pacific area on or before October 1, 1992.

10. IT IS FURTHER ORDERED that before completion of equipment installation and facility activation, the applicant shall provide the Commission with a summary of equipment which was actually installed at the Ewa earth stations.

11. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

12. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX

COUNTRY OR GEOGRAPHICAL POINT	SERVICING EARTH STATIONS	SATELLITE CIRCUIT REQUIREMENT FOR YEAR END 1990	1991	1992
American Samoa	Pago Pago	24	27	29
Australia	Sydney	23	27	35
People's Republic of China	Shanghai	5	5	6
Federated States of Micronesia	Kolonia, Pohnpei/ Moen, Truk	15	15	16
Fiji	Suva	9	10	10
French Polynesia	Papenoo, Tahiti	9	10	10
Guam	Pulantat	16	21	21
Hong Kong	Hong Kong	4	4	4
Indonesia	Jatiluhur	7	8	10
Japan	Ibaraki	76	82	93
Korea	Boeun	24	25	31
Malaysia	Kuantan	5	7	8
Marshall Islands	Majuro/Ebeye	14	15	16
New Zealand	Warkworth	4	4	6
Palau	Koror	12	14	15
Papua New Guinea	Port Moresby	3	4	4
Philippines	Pinugay	25	25	25
Saipan	Susupe	34	37	45
Singapore	Sentosa	9	10	11
Taiwan	Chin Shan Li	5	5	5
Thailand	Si Racha	8	10	11
Tonga	Nuku'alofa	8	8	9
Western Samoa	Apia	2	4	4
Total Satellite Requirement		341	377	424

FOOTNOTES

[1] Earth Station Ownership, 100 FCC 2d 250 (1984).

[2] *Id.* at 284.

[3] This authorization is not to be construed as permitting the provision of any service between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Application for Review

Application for Renewal of License
of WNBC-TV, New York, New York

MEMORANDUM OPINION AND ORDER

Adopted: March 23, 1990; Released: April 4, 1990

By the Commission:

1. On April 23, 1989, Diane Richards submitted a letter to the Commission generally opposing the application for license renewal of WNBC-TV, New York, New York. On May 25, 1989, WNBC's license was unconditionally renewed (File No. BRCT-890126KF). On May 30, 1989, Ms. Richards filed a supplemental letter and additional documents in support of the allegations set forth in the April 23 letter. Ms. Richards alleged, *inter alia*, that NBC discriminated against her because of her gender. Specifically, she asserted that NBC officials sabotaged her negotiations for a sales position with CBS in 1984 and engaged in a form of "blacklisting" which affected her negotiations for positions with other companies.

2. Ms. Richards again referred to the allegations described above in a petition for reconsideration dated June 10, 1989. On August 3, 1989, the Mass Media Bureau, acting on delegated authority, rejected Ms. Richards' claim. The Bureau letter rejecting the claim noted that with regard to charges of discrimination, the FCC acts as a receiving agency for the Equal Employment Opportunity Commission (EEOC) under Title VII of the Civil Rights Act. Accordingly "the date [a complaint of discrimination] is received by the FCC shall be deemed to be the date it was received by the EEOC."[1] The letter indicated that Title VII requires that charges be filed within 180 days of the alleged incident of discrimination. *See* 42 U.S.C. Section 2000e; 29 C.F.R. Section 1601.13. Because the events described by Ms. Richards occurred in 1984 and 1985, the Bureau concluded that her filing was untimely and that it therefore could not act on her allegations.

3. On September 1, 1989, Ms. Richards filed an application for review alleging that the 180-day deadline should not apply in her case because NBC "made it clear" that she "would not be allowed to work" if she contacted an attorney. Ms. Richards also asserts that the last incident comprising her claim occurred in November 1988. Ms. Richards notes that the events she described all took place within the license term in question. In addition, Ms. Richards contends that the Bureau wrongfully failed to address the merits of her claim. She requests that we deny renewal and conduct an investigation "until NBC has recompensed" her.

4. Ms. Richards' letters did not raise issues appropriate for Commission resolution. While Ms. Richards stated that the actions of station management were gender-based, she did not raise any substantial and material questions of fact warranting reversal of the Bureau's determination to grant the license renewal. *See* 47 U.S.C. Section 309.

5. Moreover, Commission review of an action taken pursuant to delegated authority does not permit a claimant to supplement his or her complaint with previously unreported facts. Rather, the Commission reviews the action in light of the facts before the decision-maker at the time the decision was made. *See* 47 C.F.R. Section 1.115 (c). Ms. Richards' filings dated April 23, May 30, and June 10 alleged facts which occurred in 1984 and 1985. She did not indicate that any relevant events occurred in November 1988 until filing her application for review. In any event, with regard to the November, 1988 allegations, Ms. Richards did not describe any particular event that occurred during that time and which would raise any substantial and material question of fact.

6. For the above reasons, we affirm the Mass Media Bureau. Accordingly, *IT IS ORDERED* that the application for review of the application for renewal of license of WNBC-TV, New York, New York, filed by Diane Richards *IS DENIED*. Pursuant to our *Memorandum of Understanding*, 70 FCC 2d 2320, 2330 (1978), we are referring Ms. Richards' initial claim and all supplemental pleadings to the EEOC, and by copy of this order, so notifying the licensee. It is for the EEOC, not this agency, to determine whether her claim is actionable before the EEOC.

7. *IT IS FURTHER ORDERED* that the Mass Media Bureau send by Certified Mail, Return Receipt Requested, one copy of this Memorandum Opinion and Order to the licensee of WNBC-TV and to the complainant.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] *Memorandum of Understanding Between the Federal Communications Commission and the Equal Employment Opportunity Commission*, 70 FCC 2d 2320, 2330 (1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-136

In re Applications of

HOLDER COMMUNICATIONS CORPORATION OF LOUISIANA (hereafter "KHLA") — File No. BPH-870212IC

For Construction Permit to Modify the facilities of station KHLA on Channel 258C (99.5 MHz) in Lake Charles, Louisiana.

CONNIE BROADCASTING CORPORATION (hereafter "Connie") — File No. BPH-880126NT

TRINITY RIVER VALLEY BROADCASTING COMPANY (hereafter "Trinity") — File No. BPH-880127MO

ROY E. HENDERSON (hereafter "Henderson") — File No. BPH-880127MP

For Construction Permit for a New FM Station on Channel 260C2 (99.9 MHz) in Liberty, Texas.

HEARING DESIGNATION ORDER

Adopted: March 2, 1990; Released: April 4, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for modification of the authorization of an existing FM station and for a new FM station.

2. *Preliminary Matters.* KHLA(FM), Lake Charles, Louisiana, seeks a minor modification of its authorization to specify full Class C operations on its existing channel. Accordingly, it filed the captioned minor change application. Subsequently, Rule Making action in MM Docket No. 86-411 added Channel 260C2 at Liberty, Texas.[1] The *Report and Order* in that proceeding, released November 6, 1987, indicated that the Liberty allotment would preclude KHLA's use of its proposed Lake Charles site because the proposed KHLA site was short-spaced to the Liberty allotment.[2] By letter of December 10, 1987, the Chief, FM Branch, pointed out the short-spacing and informed KHLA that it had 30 days to amend its upgrade application to account for the recent allotment action. Shortly thereafter, on December 28, 1987, the Liberty application window opened. Next, on January 11, 1988, KHLA submitted an amendment to eliminate the short-spacing to the Liberty allotment. On January 26 and 27, 1988, the Liberty applications were filed. Since the sites specified in two of those applications were short-spaced to the proposed KHLA site, KHLA was again notified by letter dated October 25, 1988 of a thirty day period in which it could again amend to eliminate the spacing deficiency. To date, KHLA has not amended to do so, and its application is being considered on a mutually exclusive basis with the conflicting applications for the Liberty channel. *See Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936, 19941 (May 13, 1985).

3. *Connie.* Connie filed an engineering amendment on April 5, 1988, in which it specified a site change. The proposed site was short-spaced both to the Channel 260A allotment at San Augustine, Texas and to an application for the San Augustine channel. Connie's amendment was not accompanied by a request for a waiver of the minimum distance separation requirements of Section 73.207 of the Commission's Rules. Accordingly, that amendment, being defective, is unacceptable for filing and will be returned. However, since the defective amendment does not render Connie's application unacceptable as originally filed, the original application will be considered herein.[3]

4. *Henderson.* Henderson's application was amended on April 22, 1988. Both the application and the amendment indicated, in response to Section V-B, Item 11, that the proposed facility would not satisfy the principal city coverage requirements of Section 73.315 of the Rules. No waiver or justification therefore was provided. However, an examination of the associated contour maps reveals that the entire community of Liberty would be covered with a 3.16 mV/m signal. Thus, it is clear from the application as a whole that the applicant will comply with the city coverage requirements. Further, we note that Section V-B, Item of Henderson's amendment indicates that the frequency applied for is Channel 260A. Since it is clear from the rest of the amendment and from the original application that the frequency applied for is Channel 260C2, a corrective amendment must be filed. Finally, in Section V-G, Item 7, of the application, the radiation center above mean sea level is listed as 161 meters, whereas the tower sketch of Exhibit E1 lists this height as 174 meters. The staff, drawing on the application as a whole, has confidently and reliably determined that the former value is correct. Since this discrepancy constitutes neither a tenderability nor acceptability defect, Henderson shall file an appropriate amendment correcting this discrepancy and the other discrepancy stated above with the presiding Administrative Law Judge within 30 days of the release of this Order.

5. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicants below have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by Connie and Henderson would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

6. Trinity petitioned for leave to amend its application on January 13, 1989 (Engineering) and January 23, 1989. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

7. The respective proposals are for different communities. Consequently, it will be necessary to determine pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio services.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Connie and Henderson would constitute a hazard to air navigation.

2. To determine: (a) the areas and populations which would receive primary aural service from the proposals and the availability of other primary service to such areas and populations; and (b) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio services.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That the April 5, 1988 amendment filed by Connie IS HEREBY RETURNED, and the Opposition to Proposed Site Restriction filed by San Augustine Cable TV, Inc. IS DISMISSED.

11. IT IS FURTHER ORDERED, That Henderson shall submit the corrective amendment specified in paragraph 4 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

12. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Trinity ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

13. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

14. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

16. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] *Liberty and Jasper, Texas*, 2 FCC Rcd 6797 (1987).

[2] 2 FCC Rcd 6798, n.8. The proposed KHLA site was 24.6 kilometers from its licensed site, thus exceeding the 16 kilometer buffer zone protection.

[3] Connie's April 5, 1988 amendment also included a request for the imposition of a site restriction on the San Augustine channel to account for the short-spacing. We note, however, that an allocation Rule Making proceeding and not this licensing proceeding is the appropriate context in which to consider Connie's proposed site restriction. Accordingly, an "Opposition to Proposed Site Restriction" submitted by San Augustine Cable TV, Inc. need not be addressed herein and will therefore be dismissed.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-125

In re Applications of

BENNETT GILBERT GAINES, INTERLOCUTORY RECEIVER FOR MAGIC 680, INC. File No. BR-880830UA

Has: 680 kHz, 5 kW, 10 kW-LS, DA-2, U

For Renewal of License for Station WCBM(AM), Baltimore, Maryland

BENNETT GILBERT GAINES INTERLOCUTORY RECEIVER FOR MAGIC 680, INC. (Assignor) File No. BAL-881117EB

and

WCBM MARYLAND, INC. (Assignee)

For Consent to the Assignment of License of Station WCBM(AM) Baltimore, Maryland

LIFESTYLE BROADCASTING, INC. Baltimore, Maryland File No. BP-880831AD

Req: 680 kHz, 5 kW, 10 kW-LS, DA-2, U

MOUNT VERNON BROADCASTING Baltimore, Maryland File No. BP-880901AD

Req: 680 kHz, 5 kW, 10 kW-LS, DA-2, U

For a Construction Permit

HEARING DESIGNATION ORDER

Adopted: March 2, 1990; Released: April 4, 1990

By the Chief, Audio Services Division:

1. The Commission, by the Chief, Audio Services Division, acting pursuant to delegated authority, has under consideration: (1) the license renewal application of Bennett Gilbert Gaines, Interlocutory Receiver ("Receiver") for Magic 680, Inc., licensee of AM radio station WCBM, Baltimore, Maryland; (2) an application for consent to the assignment of the WCBM license from Receiver to WCBM Maryland, Inc.; (3) the mutually exclusive application of Lifestyle Broadcasting, Inc. ("Lifestyle"), for a construction permit for a radio station specifying WCBM's frequency and facilities; and (4) the mutually exclusive application of Mount Vernon Broadcasting ("Mount Vernon") for a construction permit for a radio station specifying WCBM's frequency and facilities. Also before us are a petition to deny and a second petition to deny the WCBM license renewal application filed by Mount Vernon; a petition to deny and a separate motion to dismiss the assignment application of WCBM filed by Mount Vernon; a petition to dismiss or deny the Mount Vernon application filed by Receiver; a petition to dismiss or deny the Lifestyle application filed by Receiver; a petition for leave to amend filed by Mount Vernon; a request for declaratory ruling filed by Mount Vernon; and related pleadings.

2. *WCBM Renewal Application.* The WCBM renewal application and the Lifestyle and Mount Vernon applications are mutually exclusive in that they seek authorization for the same frequency in Baltimore, Maryland. Generally, when the Commission receives an application for a new broadcast facility which proposal would interfere with the operation of an existing station for which a renewal application is on file, a comparative hearing must be held between the licensee and the competing applicant to determine which application should be granted. *See* Section 73.3516(e) of the Commission's Rules. However, in this case, the WCBM license is held by Receiver, who is charged with operating the station until assignment of that license can be made to a qualified assignee. Receiver, therefore, seeks to renew the WCBM license in order to assign it to WCBM Maryland, Inc. Thus, the question arises as to which proposals are to be compared in this proceeding.[1]

3. In analogous tripartite situations, the Commission has stated that "the public interest would better be served by comparing the qualifications of the two parties intending to operate the station; namely, the prospective assignee and the construction permit applicant . . . ." *1400 Corp.*, 4 FCC 2d 715, 716 (1966). *See also*, *Cleveland Board of Education*, 87 FCC 2d 9, 10 (1981); *Bronco Broadcasting Co., Inc., et al.*, 50 FCC 2d 529, 536 (1974); *Arthur A. Cirilli, Trustee in Bankruptcy (WIGL) et al.*, 2 FCC 2d 692, 693 (1966). Consequently, because Receiver has been under a continuing obligation to effectuate an assignment of the WCBM license, we find that the most appropriate comparison under the current circumstances would be between WCBM Maryland, Inc., as the proposed assignee of the license, and Lifestyle and Mount Vernon, the applicants for a construction permit. If Lifestyle or Mount Vernon prevails in the hearing, it will be awarded a construction permit and the renewal application will be denied. If WCBM Maryland, Inc., prevails, the renewal and assignment applications will be granted.

4. Review of the assignment application indicates that WCBM Maryland, Inc., is legally, financially, technically and otherwise qualified to operate the station as proposed. The assignment as proposed will permit WCBM Maryland, Inc., to participate in a comparative hearing with Lifestyle and Mount Vernon to determine which applicant for the WCBM facilities will provide the best service to the Baltimore community.

5. In its petition to deny the WCBM renewal application, Mount Vernon indicates that "the facts set forth in the instant petition are identical in all material respects to those set forth in the petition to deny the [WCBM assignment application]," filed by Mount Vernon. Therefore, we will discuss this petition as it relates to both the WCBM renewal and assignment applications.

6. Mount Vernon alleges that Receiver's license to operate WCBM cannot be renewed because it is a "bare license."[2] In support of this allegation, it relies on *Edward B. Mulrooney*, 13 FCC 2d 946 (1968) and a similar line of cases; *i.e., Radio KDAN, Inc.*, 11 FCC 2d 934 (1968) *recon. den.*, 13 RR 2d 100 (1968), *aff'd on other grounds sub nom., W. H. Hansen v. FCC*, 413 F.2d 374 (D.C. Cir. 1969); *Donald L. Horton (KHIP)*, 10 FCC 2d 271 (1967). In *Mulrooney*, the Commission held that a bare license could not be assigned to a bankruptcy trustee when the trustee could not have use of the physical assets used in the operation of the station, and therefore would be unable to operate the station. As both Receiver and WCBM Maryland, Inc., state in their oppositions, the "glaring difference" between *Mulrooney* and the instant case is that *Mulrooney* involved a request to transfer a license to a receiver while, in the instant case, the Commission has already approved assignment of WCBM's license to Receiver. More importantly, unlike the licensees in *Mulrooney*, *Radio KDAN, Inc.*, and *Donald L. Horton*, who had been silent for an extended period of time, Receiver has managed to put, and keep, WCBM on the air by locating a proposed assignee who has made arrangements to purchase the repossessed assets of the station and to lease the real property used in the operation of the station. In their oppositions, Receiver and WCBM Maryland, Inc., cite the following cases for situations where the Commission approved the renewal of a broadcast license and its transfer from a receiver to an assignee who had arranged to lease and ultimately purchase the station's physical plant and real property from the creditor controlling that property: *Van Schoick Enterprises, Inc.*, 58 FCC 2d 341 (1976); *Public Service Enterprises, Inc.*, 69 FCC 2d 967 (1978); and *Davis Broadcasting Company, Inc.*, 67 FCC 2d 872, 875 n.6 (1977). As the oppositions note, in *Van Schoick*, 58 FCC 2d at 341, the Commission, concluded that the "entire transaction must be considered together," and specifically distinguished the *Mulrooney* line of cases:

> If the physical facilities had not been acquired, all that [the assignee] would have contracted for was a bare license. In such cases, the Commission, applying a consistent longstanding policy, would have cancelled the license and deleted the call letters.

Id. The oppositions emphasize that in *Van Schoick*, because consideration of the entire transaction revealed that the license and the assets remained intact, the Commission approved the transfer. In its reply to the oppositions, Mount Vernon alleges that *Public Service Enterprises* is not applicable, because in that situation the Commission had approved the management contract under which the proposed assignee was operating the station for the Trustee. Mount Vernon claims that, in the instant case, Receiver has never requested much less obtained, Commission approval of the consulting agreement between Receiver and WCBM Maryland, Inc. As a general practice, the Commission's approval is not needed for such a consulting agreement. Rather, once all of the circumstances surrounding such an assignment are reviewed by the Commission, it looks to the consulting agreement for assurance that the proposed assignee is directly accountable to the receiver, and that the receiver retains control of the station's finances, policies, programming and management until the Commission approves the assignment. In reviewing the instant consulting agreement, it is clear that the consulting agreement provides for Receiver to retain such control. Therefore, in light of the above, Mount Vernon's argument that Receiver's license cannot be renewed because it is a bare license is without merit and its petition to deny will be denied.

7. In its second petition to deny, Mount Vernon seeks to raise issues concerning an alleged unauthorized transfer of control of WCBM and concerning site availability. This petition to deny is grossly untimely pursuant to Section 73.3584 of the Commission's Rules. Moreover, Mount Vernon's second petition to deny is essentially a petition to specify issues. Accordingly, an opportunity to raise any allegations contained therein will be afforded the parties post-designation pursuant to Section 1.229 of the Commission's Rules.

8. *Mount Vernon and Lifestyle Applications.* Receiver filed a petition to dismiss or deny both the Mount Vernon and Lifestyle applications, alleging that: the Commission should not entertain competing applications filed against a license which is held by a receiver; that both Mount Vernon and Lifestyle are not financially qualified to acquire or construct and operate the proposed facilities; and that Mount Vernon and Lifestyle do not have reasonable assurance that their proposed facilities will be available.

9. Receiver first contends that, to protect the claims of creditors, a comparative renewal hearing is not appropriate when a station is in the hands of a receiver. Receiver contends that "[n]o public interest benefit will inure from a prolonged hearing during which the station could be forced off the air further diminishing the prospects of monetary recovery by legitimate creditors." As Mount Vernon states in its opposition, the two cases that Receiver cites to support its position are inapposite. In *RKO General, Inc. (KHJ-TV)*, 3 FCC Rcd 6242 (1988), there was no receiver involved. Moreover, a competing application had been accepted against the station's renewal application. During the ensuing comparative hearing proceeding, later-filed mutually exclusive applications were not accepted for filing. The Mount Vernon and Lifestyle competing applications, however, were timely filed against the renewal of license application of WCBM and were properly accepted for filing. Receiver argues that in *Twelve Seventy, Inc.*, 2 FCC 2d 973 (1966), the Commission determined that the public interest was best served by approval of the trustee/licensee's renewal application contingent on assignment of the license to an acceptable assignee. However, as Mount Vernon correctly states, in *Twelve Seventy*, no competing application was filed against the trustee's renewal application. Therefore, that case has no relevance to the instant facts.

10. In its opposition, Mount Vernon cites *Everett C. Peace, Jr.*, 60 FCC 2d 1087 (1976) for the proposition that the Commission cannot apply one standard when there are creditors and another when there are not. In *Peace*, the Commission rejected the receiver's claim that the presence of innocent creditors outweighed the competing applicant's right under *Asbacker Radio Corp. v. FCC*, 326

U.S. 327, 333 (1945). Therefore, we find Receiver's contention that its application should not be subject to the filing of competing applications to be without merit. The Commission is required to hold a comparative hearing when a mutually exclusive application is filed against the renewal application of a receiver. *See Arthur A. Cirilli, Trustee in Bankruptcy (WIGL) et al., supra.*

11. Receiver next contends that neither Mount Vernon nor Lifestyle is financially qualified to acquire or construct and operate the proposed facilities. With reference to Lifestyle, Receiver contends that its failure to contact Metromedia Company, the first priority creditor of the assets used to operate WCBM and the transmitter site leaseholder to determine the cost of acquiring the physical assets of WCBM, renders its financial certification meaningless and the applicant financially unqualified. It should be noted that Metromedia has already entered into a contract to sell the assets and lease the land for WCBM to the proposed assignee, WCBM Maryland, Inc. In its opposition, Lifestyle contends that in cases such as this, where the incumbent licensee can be expected to be uncooperative and refuse to discuss prices with competing applicants, an applicant fulfills its financial certification requirements by ascertaining the cost of comparable facilities. In this connection, Stanley Karas, Lifestyle's president, estimated the cost of leasing the WCBM transmitter site based on his experience as manager of WITH(AM) in Baltimore, Maryland. With respect to equipment, Karas estimated the cost of acquiring its own equipment in the event the WCBM equipment was not available to Lifestyle. Lifestyle contends that, under these circumstances, it has met the standard recognized by the Commission of having reasonable assurance that it was financially qualified at the time of filing. *Northampton Media Associates*, 3 FCC Rcd 5164 (Rev. Bd. 1988); *Armando Garcia*, 3 FCC Rcd 1065, 1065-67 (Rev. Bd. 1988), *rev. denied*, FCC 88-258, adopted July 26, 1988, and *Metromedia Radio & TV, Inc.*, 102 FCC 2d 1334, 1351-1352 (1985). We agree with Lifestyle and find Receiver's allegation that Lifestyle is not financially qualified to be without merit. *Northampton Media Associates*, 4 FCC Rcd 5517 (1989).

12. With respect to Mount Vernon, Receiver contends that its application must be dismissed because the applicant indicated it was not financially qualified at the time it filed its application. In its opposition, Mount Vernon asserts that its failure to provide an affirmative response to the financial certification question is based entirely on the refusal of Receiver and Metromedia to discuss terms with Mount Vernon, and not on Mount Vernon's lack of financial ability. Moreover, on September 6, 1989, Mount Vernon filed a petition for leave to amend and associated amendment. Mount Vernon's amendment is a declaration under penalty of perjury from its principal, Richard Falcon. He states that he has "net liquid assets in excess of one million one hundred thousand dollars which exceeds my *bona fide* estimate of the cost either to lease the existing physical facilities of AM station WCBM, Baltimore, Maryland, or to construct a substitute directional antenna facility for this frequency (including costs incident thereto such as hearing fees), and to operate the station for three months without reliance on advertising revenue." WCBM Maryland, Inc., opposes Mount Vernon's financial certification amendment because its language does not exactly repeat the financial certification in FCC Form 301. However, we believe that Mount Vernon's financial certification is sufficiently specific. In addition, Mount Vernon has determined that its financial resources are sufficient even if the existing facilities are not available to it. Therefore, no financial issue will be specified against Mount Vernon.

13. Receiver contends that both the Mount Vernon and Lifestyle applications should be dismissed or denied because they do not have reasonable assurance that the proposed transmitter site will be available. Both Mount Vernon and Lifestyle specified the transmitter site and facilities currently being used by Receiver based on the presumption of availability established by *George E. Cameron, Jr., Communications*, 71 FCC 2d 460 (1979). However, by the *First Report and Order*, in BC Docket No. 81-742, 4 FCC Rcd 4780 (1989) (*Comparative Renewal*), the Commission eliminated the *Cameron* doctrine in comparative renewal proceedings. The Commission stated that henceforth there would be no presumption of site availability for challengers. This policy became effective on August 7, 1989, and applicants, such as Mount Vernon and Lifestyle, had until September 6, 1989, to amend their applications to comply with the new policy. *See Public Notice*, Mimeo No. 3843, released July 31, 1989.

14. Lifestyle has not amended its application to specify a new site or to show reasonable assurance of its proposed site. Accordingly, a site availability issue will be designated against Lifestyle.

15. On September 6, 1989, Mount Vernon filed an amendment in which it stated that it had been unable to negotiate with, or obtain reasonable assurance of its availability from, the site owner. Nevertheless, Richard V. Falcon, Mount Vernon's principal, states that based on his understanding of the site lease, Metromedia will "have no choice but to make the property available to me." Also on September 6, 1989, Mount Vernon filed a request for declaratory ruling seeking a determination that the abolished *Cameron* doctrine should be applied so that Mount Vernon could presume the availability of the existing WCBM site. Mount Vernon contends that Receiver, as an interim licensee, does not warrant the same advantage that the elimination of the *Cameron* doctrine was designed to confer on incumbents. Mount Vernon also claims that it is not an abusive challenger. Moreover, it claims that there are no other suitable sites available for use by it as a transmitter site. Finally, it states that even though Metromedia has refused to negotiate with it, and has specifically stated that the property will not be available to the challengers, Mount Vernon still believes that since the terms of the site lease require a broadcast use, that the site will ultimately be made available to the successful applicant.[3]

16. Mount Vernon contends that the Commission should issue the declaratory ruling which it requests because the facts in this situation are unique and were not contemplated by the Commission in *Comparative Renewal*. Moreover, Mount Vernon argues that a declaratory ruling would be appropriate because it would resolve uncertainity or ambiguity. Mount Vernon alternatively requests a waiver of the post-*Cameron* policy in the event a declaratory ruling is not issued. Finally, Mount Vernon seeks an additional 30 days to amend its site proposal if its other requests are denied.

17. Pursuant to Section 0.283(b)(5) of the Commission's Rules, the Mass Media Bureau may act on requests for declaratory rulings which do not contain new or novel

arguments not previously considered by the Commission. Mount Vernon argues that the facts relating to is application were not previously considered by the Commission. However, in *Comparative Renewal* the Commission considered the situation where the transmitter site is the only feasible location for an antenna in a community of license, and the site is controlled by the incumbent who represents that the site will not be available to the challenger. Although the Commission believed that these circumstances would not often converge, when they do, a site availability issue is to be specified. Since these conditions exist in the instant situation a site availability issue will be designated against Mount Vernon. Mount Vernon's argument that Receiver is not entitled to the credit or advantage that an incumbent would normally be entitled to for an existing site, is not persuasive. The fact that Receiver has only recently become the licensee of WCBM is not a significant factor which would warrant an exception to the requirement that Mount Vernon obtain reasonable assurance of the availability of a transmitter site. We conclude that the factual situation in the instant proceeding was encompassed by the Commission's discussion in *Comparative Renewal*. Accordingly, Mount Vernon's request for a declaratory ruling is denied and its alternative request for waiver is denied. Moreover, Mount Vernon will not be afforded an additional 30 days to amend its application to specify another site. Any subsequent amendment will have to meet the good cause requirements of Section 73.3522 of the Commission's Rules.

18. Except as indicated by the issues specified below, the applications of WCBM Maryland, Inc., Lifestyle Broadcasting, Inc., and Mount Vernon Broadcasting demonstrate that the applicants are legally, financially, technically and otherwise qualified to operate as proposed.[4] A hearing will be held to compare their qualifications. If Lifestyle or Mount Vernon prevails in the hearing, it will be awarded the construction permit and the renewal application will be denied. If WCBM Maryland, Inc., prevails, the renewal and assignment applications will be granted.[5]

19. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Mount Vernon and Lifestyle have reasonable assurance of the availability of the proposed transmitter site they have each specified.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest; and

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications, if any, should be granted.

20. IT IS FURTHER ORDERED, That the petitions to deny the WCBM renewal and assignment applications, and the motion to dismiss the assignment application filed by Mount Vernon Broadcasting ARE DENIED.

21. IT IS FURTHER ORDERED, That the petition to dismiss or deny the Mount Vernon Broadcasting application, filed by Bennett Gilbert Gaines, Interlocutory Receiver, IS DENIED.

22. IT IS FURTHER ORDERED, That the petition to dismiss or deny the Lifestyle Broadcasting, Inc., application, filed by Bennett Gilbert Gaines, Interlocutory Receiver, IS DENIED.

23. IT IS FURTHER ORDERED, That the request for declaratory ruling filed by Mount Vernon Broadcasting IS DENIED.

24. IT IS FURTHER ORDERED, That the Petition for Leave to Amend filed by Mount Vernon Broadcasting, IS GRANTED, and the amendment IS ACCEPTED to the extent indicated herein.

25. IT IS FURTHER ORDERED, That the second petition to deny the renewal and assignment applications filed by Mount Vernon IS DISMISSED.

26. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

27. IT IS FURTHER ORDERED, That to avail themselves of an opportunity to be heard, the applicants shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

28. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] Mount Vernon's November 30, 1989, motion to dismiss the assignment application of WCBM contends that the purchase agreement between Receiver and WCBM Maryland, Inc., has expired of its own terms and, thus, suggests that the assignment can not be granted. However, the parties to the purchase agreement in their opposition to the motion to dismiss and their second petition to deny indicate that they still regard it as viable and are awaiting Commission action. Accordingly, Mount Vernon's motion to dismiss will be denied.

[2] Mount Vernon again raises this argument in its second petition to dismiss but is no more persuasive than before.

[3] Mount Vernon also refers to an *ex parte* solicitation concerning the status of the assignment application from Receiver to WCBM, Maryland, Inc. However, it appears that the inquiry requested information about the status of the hearing and was not addressed to the merits of the proceeding.

[4] Operation with the facilities specified herein is subject to modification, suspension or termination without right to hearing, if found by the Commission to be necessary in order to conform to the Final Acts of the ITU Administrative Conference on Medium Frequency Broadcasting in Region 2 Rio de Janeiro 1981 and to bilateral and other multilateral agreements between the United States and other countries.

[5] We are also consolidating the renewal application for the purpose of permitting action on that application in accordance with paragraph 3 above.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-426

In re Applications of

SHAWN PHALEN	File No. BPH-851231MO
ELLWOOD BEACH BROADCASTING, LTD.	File No. BPH-851231MS
SPIRIT BROADCASTING	File No. BPH-860102MZ
JAMES EVANS	File No. BPH-851231MR
CLAUDIA BRATTON	File No. BPH-860102MX

For Construction Permit for New FM Broadcast Station at Montecito, California

APPEARANCES

David Tillotson on behalf of Shawn Phalen; *Lewis I. Cohen, John J. Schauble*, and *Roy Boyce* on behalf of Ellwood Beach Broadcasting, Ltd.: *Eric S. Kravetz* on behalf of Spirit Broadcasting; *Peter A. Casciato* and *Lee J. Peltzman* on behalf of James Evans; and *Alfred C. Cordon* and *Dennis J. Kelly* on behalf of Claudia Bratton.

SUPPLEMENTAL SUMMARY DECISION
OF
WALTER C. MILLER

Issued: March 27, 1990; Released: April 4, 1990

1. On March 9, 1990, Claudia Bratton filed a Motion for Summary Decision. She filed her motion pursuant to 47 CFR § 1.251(a), and wants the remanded financial issue resolved in her favor. *See* FCC 89R-82, released Janaury 4, 1990; and FCC 90M-101, released January 18, 1990 at para. 1.[1]

2. Phalen opposed Bratton's motion on March 21, 1990; and James Evans and Ellwood Beach opposed it two days later.[2]

BACKGROUND

3. The Chief, Audio Services Division first designated this proceeding back on October 8, 1987. *See* DA 87-1354. At that time he mistakenly excluded James Evans' and Claudia Bratton's applications from processing consideration. So the Chief corrected his mistake on February 19, 1988. *See* DA 88-205. But he specified no financial issue against Bratton.

4. During the course of the evidentiary hearing one of Bratton's opponents, Shawn Phalen, twice tried unsuccessfully to get financial and financially-related character issues added against Claudia Bratton. *See* FCC 88M-793 released June 9, 1988, and FCC 88M-2037, released July 1, 1988.

5. After the hearing was completed the Presiding Officer issued his Initial Decision (4 FCC Rcd 5714, released July 25, 1989). He concluded that, under the standard comparative issue, Claudia Bratton will offer the best practicable service to the public. So he granted her application and denied the then remaining five applicants.[3]

6. Four of the remaining losers appealed that Decision, and the Review Board held oral argument on it on December 15, 1989. At the argument the parties devoted a considerable amount of time to arguing non-issues; *i.e.*, whether Claudia Bratton was financially qualified, and whether she had misrepresented financial facts to the Commission.[4] (*See* Tr. 1304-1306, 1312, 1318-1323, 1329-1336, 1345-1355, 1355-1356, 1362-1363, and 1367-1374).

7. However, and despite all the losers' arguments, the Review Board designated *only* a straight financial issue on remand. They carefully avoided adding any character issues, and they didn't even specify the financial qualification issue they wanted tried. *See* Footnote 1 *supra*. So the Presiding Officer framed an issue:

> "To determine whether Claudia Bratton is financially qualified to be a Commission licensee, and if not, whether she is basically qualified to be a Commission licensee."

8. On March 9, 1990, Ms. Bratton filed a Motion for Leave to Amend. There she sought to meet the concerns that the Board expressed in their remand order, and to demonstrate that she is financially qualified to be a Commission licensee. She did so by filing a brand new financial proposal.

9. Three of her four opponents (Phalen, Ellwood Beach, and Evans)[5] each opposed her amendment request. Ms. Bratton's motion was granted, and her amendment accepted. *See* FCC 90M-618 released March 26, 1990. Simultaneously, on March 9, 1990, Ms. Bratton filed the Motion or Summary Decision. That motion has been opposed by the same three opponents (see paras. 1-2 *supra*.).

RULING

10. Claudia Bratton's motion will be granted. Ms. Bratton has demonstrated that there is no genuine issue of material fact to be determined at a hearing. *See* 47 CFR § 1.251(a)(1), and *New Broadcasting Corporation*, 44 FCC 2d 386 (Rev. Bd. 1973). In so doing, she has established that the truth is clear, and the *basic* facts are undisputed. *See* Findings of Fact *infra*.

FINDINGS OF FACT

11. Under the financial issue we must find out if Claudia Bratton is financially qualified to construct her proposed station and operate it for three months without revenue.

12. She estimates that it will cost her $245,086.62 to construct and operate the station for three months without revenue. She calculates: her total construction costs at $154,693.18; her initial three months of staffing at $40,593.80; her total initial costs of operation at $39,799.64; and any miscellaneous costs for the initial three months of $10,000.

13. Ms. Bratton intends to meet her financial obligation through a $350,000 loan from South Jersey Radio, Inc., of Linwood, New Jersey. Thus, she has avoided the problems that the Review Board had with her December 31, 1985 "reasonble assurance" loan letter from the Bank of Montecito, and that same Bank's May 19, 1988 reconfirmance.

14. The face of South Jersey's "commitment" shows clearly and unambiguously the amount of the loan, its repayment terms, the interest rate and the collateral. Moreover, Ms. Bratton has demonstrated that South Jersey, a multiple mass-media owner, has not been given or promised any equity interest in her Montecito FM station, nor any right to acquire any equity interest.

15. Finally, South Jersey has demonstrated that it has the financial wherewithal to make the $350,000 loan to Bratton. Indeed they have gone so far as to work out a firm commitment with the National Community Bank of Linwood, New Jersey.

16. Based on Findings 12-15 *supra.*, Claudia Bratton has a cushion of about $105,000 over and above her estimated financial obligation ($350,000-$245,000). Note that she hasn't included her projected legal fees in her $245,000 costs calculation.[6] She projects those fees at $80,00, and the reason she hasn't included them is because she has an agreement with her attorneys, Cordon and Kelly. They have agreed to defer the legal fees that would be incurred until after the third month of operation. So it is a properly excludable item. However, even if that $80,000 were factored into her costs, she would still have a $25,000 cushion.

17. Bratton's opponents are concerned with her borrowing money from another client of her counsel at an "exorbitant" interest rate (21 percent per annum).[7] That needn't concern us, so long as a *bona fide* agreement has been struck, and there is no indication in any of the papers Bratton has submitted that the deal is phoney. If we are going to deal in "binding loan commitments" as opposed to "reasonable assurance," we certainly must expect the interest rate to go up. The risk to the intermediate lender is greater and of longer duration, and he certainly wants to reap a profit from the transaction. That's what capitalism is all about. In any event, Bratton's opponent's complaint doesn't raise a genuine issue of material fact that requires a hearing.

CONCLUSION OF LAW

18. Claudia Bratton has met the financial issue that has been designated against her. She has demonstrated that she is financially qualified to construct her proposed station, and operate it for three months. without revenue.[8]

SO the Motion for Summary Decision that Claudia Bratton filed on March 9, 1990, IS GRANTED;[9]

The Initial Decision released July 25, 1989 (4 FCC Rcd 5714) as supplemented by this Summary Decision IS REINSTATED; and

Unless an appeal is taken from 4 FCC Rcd 5714 as supplemented or the Commission reviews it on its own motion, and Claudia Bratton's application (BPH-860102MS) IS AGAIN GRANTED;

The applications of Shawn Phalen (BPH-851231MO); Ellwood Beach Broadcasting Ltd. (BPH-851231MS); Spirit Broadcasting (BPH-860102MA); and James Evans (BPH-860102MX) ARE AGAIN DENIED.[10]

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

FOOTNOTES

[1] The Review Board, in its remand order, did not specifically word the financial issue it wants tried. *See* FCC 89R-82 *supra.*, at para. 12. They left it up to the Presiding Officer to phrase that issue. He has phrased the broad standard financial issue that embraces both costs as well as sources of revenue. *See* FCC 90M-101 *supra.*, para. 1.

[2] All oppositions and comments were due on March 23, 1990.

[3] At that time Peacock Broadcasting, Ltd., was still prosecuting its application. Later the Review Board dismissed Peacock. *See* FCC 89R-82 *supra.*, at para. 10.

[4] Claudia Bratton suggests that the reason the losers argued the *non-issues* so strenuously is because they didn't stand a prayer under the issues. There appears to be some merit to that suggestion. Certainly the comparative analysis turned out to be a laugher. *See* 4 FCC Rcd 5714 *supra.*, at Conclusion 17.

[5] Spirit failed to oppose either Brattons' amendment request or this motion for summary decision. *See* para. 1 *supra.* Can it be that Spirit has thrown in the towel?

[6] Ms. Bratton paid the hearing fee portion of her legal bill in March 1988.

[7] Since South Jersey can borrow their $350,000 from the National Community Bank of Linwood at that Bank's prime rate (10% at present), it appears that they struck a pretty good bargain for themselves.

[8] In her opposition to Bratton's motion Shawn Phalen concedes that Bratton's financial proposal " . . . is, undeniably, adquate . . . " But, says Phalen, that financial plan raises serious questions whether she (Bratton) would be able to continue to operate the station for much beyond three months. That argument is sheer speculation. but, in any event, the Presiding Officer has no intention of changing the legal financial qualifications test the Commission has set down. If Phalen is suggesting that the "three months without revenues" portion of the standard be lengthened, she's come to the wrong forum.

[9] The hearing presently scheduled to begin on April 16, 1990 is cancelled.

[10] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, the Summary Decision will become effective 50 days after its public released. *See* 47CFR 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
March 26, 1990

Released: March 27, 1990

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In re: KRTH(AM), Los Angeles, California
File No. BAL-891004EA

Gentlemen:

This letter refers to the above-captioned application (BAL-891004EA) for assignment of license of station KRTH(AM), Los Angeles, California, from Beasley AM Acquisition Corp. to Liberman Broadcasting, Inc. ("Liberman"). Liberman is also the licensee of stations KWIZ-AM/FM, Santa Ana, California, and a grant of the instant application will result in a violation of Section 73.3555(a)(1) of the Commission's Rules due to the overlap of the 5 mV/m service contours of KRTH-AM and KWIZ-AM.[1] Accordingly, you have requested an eighteen-month waiver of Section 73.3555(a)(1)[2] of the Rules to allow time for taking orderly divestiture steps that will bring Liberman into compliance with the Commission's regulations. On March 7, 1990, a supplement was received which includes additional and updated information in support of the waiver request.

The engineering exhibit to the referenced application indicates that the overlap between the KRTH and KWIZ 5 mV/m daytime contours is 198 square kilometers or 6 percent of the area within KRTH's contour and 16 percent of the area within KWIZ's contour. Similarly, the nighttime overlap area is 495 square kilometers or 16 percent of the area within KRTH's contour and 59 percent of the area within KWIZ's contour. Also, statistics are provided which reflect that the overlap areas are heavily populated.

In support of the waiver request, you state that the temporary waiver would permit a "qualified minority buyer with a proven track record of service in Santa Ana, California, to 'move up' by acquiring an AM outlet in the larger Los Angeles market." Further, you state that the proposed acquisition will lead to the establishment of an independently programmed Spanish-language AM voice in the Los Angeles market, and will add to the diversity of programming in the market because KRTH(AM) currently simulcasts the KRTH-FM programming. You also maintain that, based on U.S. Bureau of the Census statistics, the stations actually operate in two separate markets for business and advertising purposes, with KWIZ(AM) in the Santa Ana-Anaheim market and KRTH(AM) in the Los Angeles-Long Beach market, and that both of these markets include a "great number" of competing voices so that diversity will not be compromised. In this respect during the waiver period, you state that Liberman will staff, operate and program the two AM facilities separately. Specifically, you state that Liberman intends to operate the stations as separate entities with wholly distinct identities, with separate staffs and management teams with no duplicative personnel. Additionally, air time will not be sold on a combination basis.

As further support for the waiver request, in the March 7 supplement you state that Liberman has engaged in efforts to divest itself of KWIZ(AM). These efforts include meetings with potential buyers and arranging with a broker to assist with the sale. Despite these efforts, you state that there are no outstanding offers to purchase the station, and its marketability as an entity distinct from KWIZ-FM remains unclear. Given the general difficulties that may be encountered in selling a stand-alone, specialized format AM station in a market like Santa Ana, you argue that the requested waiver is necessary to avoid a "fire sale" situation. In this connection, you have indicated that the window of opportunity to purchase KRTH is a very limited one and that an immediate forced sale of KWIZ(AM) "could unnecessarily restrict the value of the [station] and could artificially limit the range of potential buyers" or could otherwise "work an economic hardship on [Liberman] without offsetting public interest benefits." *Mad River Broadcasting Co.*, 4 F.C.C. Rcd. 6456, 6458 (1989); *see also Metromedia Radio and TV*, 102 F.C.C. 2d 1334 (1985), *recon. denied*, 59 R.R. 2d 1211 (1986). You emphasize that Liberman is a minority-controlled entity that needs to realize full value from the sale of this station.

You maintain that the transaction is in the public interest since Liberman will be able to use its broadcast experience in a larger market. You also have represented that it is Liberman's intention to sell KWIZ(AM) to a minority party with no other media interests in the market in order to ensure the greatest amount of diversity in the market.

The ultimate objectives of the Commission's multiple ownership rules are to promote economic competition and diversity of programming and viewpoints in order to further the public interest. *See Amendment of Section 73.3555 of the Commission's Rules*, 4 F.C.C. Rcd. 1723 (1989); *Multiple Ownership Rules*, 97 F.C.C. 2d 997 (1984), *recon. granted in part and denied in part*, 1 F.C.C. Rcd. 802 (1986). The Commission is not, however, without flexibility to respond to situations where application of fixed multiple ownership standards would be contrary to other public interest concerns; thus, for example, in some cases we have waived the rules in order to achieve appropriate and desirable improvements of service. *See Capital Cities Communications*, 59 R.R. 2d 451 (1985). However, before such a waiver can be granted, even on a temporary basis, an applicant must sustain the burden of showing that the benefits to be achieved by its proposal are in the public interest and that waiver would not compromise the fundamental policies served by the rule.

Although the overlap area is heavily populated, and while we find that both stations are in the same market as defined by Arbitron rankings, we are persuaded that no undue concentration of the media will result from a grant of a limited temporary waiver. The Los Angeles market, ranked second in the country in both the radio and TV markets, is served by an abundance of diversely owned traditional broadcast and alternative media services. Therefore, the limited waiver will not have a significant adverse impact on diversity or competition. *See Knoxville Channel 8 Limited Partnership*, 4 F.C.C. Rcd. 4760 (1989). Moreover, Liberman has represented that during the waiver period, it agrees to staff, operate and program the two AM facilities separately. Further, because Liberman's opportunity to acquire KRTH(AM) appears quite limited in duration, denial of the requested waiver could require a minority applicant to choose between the immediate "forced" sale of its existing station or foregoing the chance to "move up" to a major market broadcast facility. Under the circumstances already noted, we do not believe such a result is warranted, particularly since Liberman has committed itself to the timely sale of its Santa Ana station and has demonstrated good faith, initial efforts to do so. In this regard, we note Liberman's assertion that it has enlisted a broker to assist in the sale of KWIZ(AM), that it has already met with some prospective buyers and that it is actively seeking others. Moreover, this transaction will ultimately advance diversity in both the Los Angeles and Santa Ana markets since it will have the effect of separating commonly owned AM-FM combinations in both cities. However, we believe that twelve months, rather than eighteen, is a sufficient amount of time to divest KWIZ(AM) in an orderly fashion.

Based on the foregoing, we believe that in the circumstances presented here, a temporary waiver of the contour overlap provisions of Section 73.3555(a)(1) of the Commission's Rules will not result in an undue concentration of the media and will not create any detriment to the policies underlying the rule. Accordingly, Liberman Broadcasting Inc.'s request for temporary waiver of the contour overlap provisions of Section 73.3555(a)(1) of the Commission's Rules, IS HEREBY GRANTED as modified herein. Moreover, upon a finding that the applicant is qualified and the public interest will be served, the application (File No. BAL-891004EA) for assignment of license of KRTH(AM), Los Angeles, California, from Beasley AM Acquisition Corp. to Liberman Broadcasting, Inc. HAS BEEN GRANTED this date.

BY DIRECTION OF THE COMMISSION*

Donna R. Searcy
Secretary

*Commissioner Marshall not participating.

FOOTNOTES

[1] Section 73.3555 states in pertinent part:

> (a) No license for an AM . . . broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates or controls one or more broadcast stations in the same service and the grant of such license will result in:
>
> (1) Any overlap of the predicted or measured 5 mV/m groundwave contours of the existing and proposed AM stations . . .

[2] *See First Report and Order In MM Docket No. 87-7*, 4 F.C.C. Rcd. 1723 (1989), which relaxed the contour overlap provisions of Section 73.3555 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 30, 1990

COMMENT AND REPLY COMMENT PERIODS EXTENDED FOR PR DOCKET 90-26

In response to a request by the Radio Technical Commission for Maritime Services (RTCM) the comment and reply comment periods for PR Docket 90-26, Notice of Proposed Rule Making (NPRM) to amend Part 80 of the Commission's Rules to require that marine VHF transmitters automatically cease operation after a predetermined period of time have been extended. Comments are due May 10, 1990, and reply comments are due May 25, 1990.

PR 90-26 requires that all marine VHF transmitters manufactured after a specified date must automatically cease operation. The Commission adopted this NPRM to alleviate congestion on marine VHF channels and requested specific comments about this proposal and its effect on public correspondence channels. The RTCM requested the extension of time to allow time to effectively coordinate responses from all affected segments of the maritime community.

For further information contact George R. Dillon at (202) 632-7175.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-343

In re Applications of

Francisco Resto Torres d/b/a NAGUABO BROADCASTING COMPANY	File No. BPH-861023MA
JORGE G. BLANCO GALDO	File No. BPH-861027ME
REYES RUIZ RIVERA	File No. BPH-861027MF
HECTOR NEGRONI CARTAGENA	File No. BPH-861027MH
EFRAIN ARCHILLA-DIEZ	File No. BPH-861027MI

For a Construction Permit for a New FM Station on Channel 225A in Naguabo, Puerto Rico

Appearances

Timothy K. Brady, Esquire, on behalf of Francisco Resto Torres d/b/a Naguabo Broadcasting Company; *Matthew H. McCormick, Esquire*, and *Dennis F. Begley, Esquire*, on behalf of Jorge G. Blanco Galdo; *Forbes W. Blair, Esquire*, and *Marjorie Conner, Esquire*, on behalf of Reyes Ruiz Rivera; *Daniel J. Alpert, Esquire*, on behalf of Hector Negroni Cartegena; *John P. Bankson, Jr., Esquire*, and *Susan W. Bladek, Esquire*, on behalf of Efrain Archilla-Diez; and *Gary P. Schonman, Esquire*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH STIRMER

Issued: March 26, 1990; Released: April 5, 1990

PRELIMINARY STATEMENT

1. By *Hearing Designation Order* (*HDO*) released August 3, 1988 (DA 88-974), the Commission designated for hearing the mutually-exclusive applications of Francisco Resto Torres d/b/a Naguabo Broadcasting Company (Restô or NBC), Jorge G. Blanco Galdo (Blanco), Reyes Ruiz Rivera (Ruiz), Hector Negroni Cartagena (Negroni), and Efrain Archilla-Diez (Archilla) for a construction permit for a new FM station on Channel 225A (96.9 MHz) in Naguabo, Puerto Rico.[1]

2. The *HDO* specified the following issues[2]:

> 1. (a) To determine whether the proposals of NBC, Galdo, Rivera [and] Archilla-Diez . . . are consistent with the minimum separation requirements of Section 73.207 of the Commission's Rules; (b) to determine whether the proposals of . . . Galdo and Cartagena would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules; and (c) in light of the evidence adduced concerning (a) and (b), above, whether circumstances exist which warrant waivers of the appropriate rule sections.
>
> 2. To determine whether there is a reasonable possibility that the tower height and location proposed by . . . Cartagena would constitute a hazard to air navigation.[3]
>
> 3. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.[4]

3. In addition to the foregoing issues, the following additional issues were specified pursuant to petitions to enlarge which were filed by the applicants:

Concerning Archilla, by *Memorandum Opinion and Order* of the Presiding Judge, released November 17, 1988 (FCC 88M-3911):

> To determine whether Archilla presently has reasonable assurance of the availability of his currently proposed transmitter site[5]; whether he had such reasonable assurance of the availability of the site at the time he amended his application on November 9, 1987, to specify his current site; and whether Archilla misrepresented facts in certifying that he had reasonable assurance.
>
> To determine in light of the evidence adduced under the foregoing issue, the effect on Archilla's basic qualifications.

Concerning Negroni, by *Memorandum Opinion and Order* of the Presiding Judge, released November 17, 1988 (FCC 88M-3910):

> To determine whether Negroni impermissibly attempted to deprive one of his adversaries of a transmitter site.
>
> To determine whether Negroni has abused the Commission's processes.
>
> To determine, in light of the evidence adduced under the above issues, whether Negroni possesses the basic qualifications to be a Commission licensee.

Also, concerning Negroni, by *Memorandum Opinion and Order* of the Presiding Judge, released November 17, 1988 (FCC 88M-3909):

To determine whether Negroni, through a Motion to Enlarge Issues filed September 9, 1988, falsely represented that a declaration attached to the petition bore the signature mark of declarant Domingo Cruz Rodriguez.

To determine with respect to the submission of the above-referenced declaration, whether Negroni abused the Commission's processes, misrepresented facts or exhibited a lack of candor.

To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Negroni is basically qualified to be a Commission licensee.

Concerning Blanco, by *Memorandum Opinion and Order* of the Presiding Judge, released November 17, 1988 (FCC 88M-3909):

To determine whether [Blanco] possessed "reasonable assurance" of the availability of his transmitter site at the time he filed his application, and if not, the effect of that finding on his basic qualifications to be a Commission licensee.

To determine whether [Blanco] was lacking in candor and/or made misrepresentations to the Commission by proposing a transmitter site without having "reasonable assurance" of the site's availability, and if so, the effect of that lack of candor and/or misrepresentation on his basic qualifications to be a Commission licensee.

Also, concerning Negroni, by *Memorandum Opinion and Order* of the Presiding Judge, released February 7, 1989 (FCC 89M-378):

To determine whether the proposal of Hector Negroni Cartagena would provide service to Naguabo, Puerto Rico, without being obstructed by a major obstruction as required by Section 73.315(b) of the Commission's rules, and if not, whether circumstances exist which warrant a waiver of that rule.

4. A prehearing conference was held on October 6, 1988. Hearing sessions were held from March 28 through March 31, 1989, April 3 through April 6, 1989, on April 24, 1989, and on May 30, 1989. The record was closed on May 30, 1989.

5. Proposed findings of fact and conclusions of law were filed by the parties on August 30, 1989. Reply findings were filed by all parties on October 4, 1989.

FINDINGS OF FACT

Comparative Issue

Francisco Resto Torres d/b/a Naguabo Broadcasting Company (Resto or NBC)

Structure and Integration

6. Francisco Resto Torres is an individual applicant, doing business under the name Naguabo Broadcasting Company (NBC). Resto is employed as general sales manager of WVJP-AM/FM, Caguas, Puerto Rico. In the event his application is granted, Resto will terminate his current employment and sever all connections with WVJP-AM/FM. (NBC Ex. 2, p. 1.)

7. Resto, who is of Hispanic descent, will be integrated into the management and operation of the proposed station on a full-time basis (minimum of 40 hours per week) in the role of general manager. In his role as general manager, Resto will assume responsibility for supervision of all phases of station operation, including overall supervision of the performance of all station employees in their assigned duties. All management level employees will report directly to him. His duties will also include, but not be limited to, overseeing the continuing ascertainment of community needs and interests and formulating responsive programming to meet those needs and interests; formulating station policy; assuring station compliance with the Commission's rules and regulations; and effectuating the EEO program. (NBC Ex. 2.)

8. Resto and his wife, together, presently own a gift shop located in Caguas, Puerto Rico. (Tr. 784, 788-789.) The shop is primarily operated by his wife. (Tr. 784.) However, Resto works at the shop on Saturdays, reviews the financial records of the shop, and occasionally makes deposits for the shop. (Tr. 784-785.) He also goes to the shop every day to eat lunch with his wife. (Tr. 784.) Resto estimated that the revenue derived from the gift shop constitutes 30 percent of his annual income. (*Id.*) If successful in obtaining the construction permit for the proposed station, Resto and his wife will sell the gift shop. (Tr. 785.) His wife plans to work at the proposed station on a full-time basis and will have responsibility for all programming. (Tr. 785-786, 789.)

9. Resto currently resides in Caguas, Puerto Rico. In the event his application is granted, he will move his residence to Naguabo, Puerto Rico. (NBC Ex. 2, p. 2.)

10. Resto has been actively involved in broadcasting for 19 years. From January through March 1970, Resto was employed full time at WNEL-AM, Caguas, as a disc jockey and control man. From April through July 1970, Resto was employed full time at WRAI-AM, San Juan, as a control man. From early 1971 through 1980, Resto was employed full time at WVJP-AM as a disc jockey and control man. From 1975 to 1980, Resto was also employed part-time at WBRQ(FM), Cidra, as a salesman. From 1981 to the present, Resto has been employed full time at WVJP-AM/FM as sales manager. (NBC Ex. 2, p. 2.)

Diversification

11. With the exception of Resto's employment at WVJP-AM/FM, neither Resto nor any member of his immediate family has any other interest in or connection with any broadcast facility or other medium of mass communications. (NBC Ex. 2, p. 1.)

Auxiliary Power

12. NBC will install and utilize auxiliary power generating equipment at both transmitter and studio sites in the event the NBC application is granted. (NBC Ex. 2, p, 1.)

Jorge G. Blanco Galdo (Blanco)

Structure and Integration

13. Blanco is an individual applicant for the Naguabo facility. If his application is granted, Blanco will work full time, a minimum of 40 hours per week, as general manager of his proposed Naguabo FM station. He will supervise the day-to-day operation of the station, including programming, finances, sales and engineering. He will have ultimate authority for hiring and firing employees. Prior to the commencement of program tests on the Naguabo FM station, he will leave all other employment in order to work at the Naguabo station on a full-time basis. (Blanco Ex. 1, p. 1.)

14. Blanco is Hispanic. He was born February 25, 1964, in Santurce, Puerto Rico. (Blanco Ex. 1, p. 1.) He has never lived within the service contour of his proposed station. (Tr. 856.) However, if his application is granted, Blanco will move to Naguabo. (Blanco Ex. 1, p. 1.)

15. Blanco's past broadcast experience may be summarized as follows: From February 1989 to the present, Blanco has worked full time as chief engineer for stations WRSJ-AM, Bayamon; WVOZ-AM, San Juan and WVOZ(FM), Carolina. (Blanco Ex. 1, p. 2.) From June 1986 to the present, Blanco has been operations manager of station WMTI-AM (formerly WCQC), Morovis (full time until June 1988, then part-time). (Tr. 838-839; *Id.*) In this position, Blanco has been in charge of station personnel and programming, including news. He also has had supervisory responsibility over sales and advertising copy writing. Additionally, he has been the station's maintenance engineer. (Blanco Ex. 1, p. 2.) From 1980 through 1986, while a high school and university student, Blanco worked part-time at Station WCQC. (*Id.*) He devoted as much time as possible to the station. (Tr. 842, 866.) He performed various duties for the station, including being a disc jockey and providing engineering assistance. From January 1985 to May 1986, Blanco attended the University of Maryland and worked at Station WCQC when he was in Puerto Rico during vacations and semester breaks. He also did some work for the station by telephone while he was in Maryland. (Blanco Ex. 1, pp. 2-3.)

16. Additionally, from 1979 through 1984, Blanco provided engineering assistance in connection with the construction and maintenance of station WSAN(FM) (previously WLID(FM)), Culebra, Puerto Rico. From 1979 through 1984 and 1986 through June 1988, Blanco provided engineering assistance in the maintenance of stations WVOZ-AM, WVOZ(FM), and WAPA-AM, San Juan. (Blanco Ex. 1, p. 3.) Blanco received his Third Class Radiotelephone Operator Permit from the FCC when he was 12 years old. (Tr. 864.)

Diversification

17. Blanco has no media interests other than his present employment with stations WCQC-AM, Morovis; WRSJ-AM, Bayamon; WVOZ-AM, San Juan, and WVOZ(FM), Carolina, all in Puerto Rico. Blanco, however, will terminate his employment and sever all connections with those stations prior to commencement of program tests. (Blanco Ex. 1, p. 1.)

Reyes Ruiz Rivera (Ruiz)

Structure and Integration

18. Reyes Ruiz Rivera is an individual applicant for a new FM broadcast station to be operated on Channel 225A at Naguabo, Puerto Rico. He presently resides at Road 31, Kilometer 9.5, Bo. Rio Blanco, in the municipality of Naguabo, Puerto Rico, and has lived at that address all of his life (38 years), except during his four years at college. His home in Rio Blanco is about a five-minute drive from Naguabo town. (Tr. 1103.) He is Hispanic. (Ruiz Ex. 1, p. 1.) Mr. Ruiz is a businessman with headquarters in Naguabo. He is the sole proprietor of a service station in Naguabo and the owner of a sound equipment business. He is a graduate of the University of Puerto Rico, having majored in business administration. (Ruiz Ex. 1, p. 1.) He studied general engineering for three years. (Tr. 1102.)

19. If Ruiz is granted the Naguabo permit, he intends to work at the station full time, at least 40 hours per week, as the general manager. As general manager, he will supervise all aspects of day-to-day station operations including, but not limited to, programming, sales, and personnel, and the general administration of the station. (Ruiz Ex. 1, p. 4.)

20. Ruiz, as noted, is the sole proprietor of a service station in Naguabo and the owner of a sound equipment business. (Ruiz Ex. 1, p. 1.) Ruiz has owned a service station since September 27, 1977, which has been his primary business since that time. (Tr. 1080.) It has four gas pumps and one car lift and is open seven days a week, 11 to 12 hours per day. It has three full-time employees and one part-time employee. (Tr. 1080-1081.) The service station is located at the same address at which he lives. (Tr. 1079.) He has his office in the gas station and resides behind it. (Tr. 1081.) Ruiz intends to maintain the gas station and continue ownership of it. (Tr. 1083.) He has no intention of selling any of the businesses that he presently operates. (Tr. 1084.) The annual revenues of the gas station in 1987 were around $400,000. The revenues in 1988 were a little less. (Tr. 1084-1085.) Ruiz currently devotes approximately 15 to 20 hours a week to the gas station. (Tr. 1085.) Ruiz receives a little more than 50 percent of his income from it. (Tr. 1082.) There is a possibility that he will operate the radio station from the same location as the gas station. (Tr. 1089-1090.)

21. Ruiz, as previously noted, also operates a sound equipment or amplification business in Supersovide de Puerto Rico. (Tr. 1085-1087.) He lines up job and hires independent contractors to set up and operate the equipment. (Tr. 1086.) While this business has no regular employees, there are a number of persons with whom Ruiz contracts on a regular basis. (Tr. 1086-1087.) He currently devotes approximately 15 to 20 hours a week to the sound business. (Tr. 1087.) Ruiz receives the balance of his income from the sound business, with the exception of about 10 percent which he receives from producing a television program. (Tr. 1087.) For 1987, the gross revenues of the sound business were approximately $40,000 to $50,000. (Tr. 1088.) Ruiz now keeps the books for the gas station and also for the sound company, and takes care of all financial affairs for both businesses. However, Ruiz stated that he already is going through transactions to get someone to handle the finances of the businesses. (Tr. 1089.)

22. In order to be able to fully effectuate this integration commitment, Ruiz intends to devote less than five hours per week to his other businesses (sound equipment and service station). Ruiz had a small publicity agency in which he taped commercials in Naguabo which is no longer active and which will not be reactivated if Ruiz receives the FM permit. (Tr. 1079, 1147.) He will employ at least two additional employees to assist with his other businesses (Ruiz Ex. 1, pp. 4, 5), one of whom will be in complete charge of the gas station and the other in charge of the sound business. (Tr. 1148.)

23. Ruiz teaches high school students on the use and operation of audio equipment. From 1964 to 1968, he was directly involved in the creation of "Asoc. Recreativa de Rio Blanco" and was a member of the Sports Committee. He has been involved in fund-raising activities for: Asociacion Recreative Rio Blanco Recreational Association; American Red Cross; Police Athletic League; Muscular Dystrophy Association; Cancer Association; Odd Fellows; and Lions Club. (Ruiz Ex. 1, pp. 5-6.) He is not presently a member of the Red Cross. He was a member of the Police Athletic League, but he has not been a member for many years. He is not a member of the Muscular Dystrophy Association, the Cancer Association, the Odd Fellows or the Lions Club. (Tr. 1118-1119.) Only the following organizations are located within the service area of the proposed station: the American Red Cross, Police Athletic League, Cancer Association, Odd Fellows and Lions Club. His association with these organizations is limited to raising funds for them, with the exception of two of which he was formerly a member. (Tr. 1150.) In 1984, Ruiz assisted a religious group (at no charge) which had a concert in Humacao, Puerto Rico. (Ruiz Ex. 1, p. 6.) Ruiz was paid for providing sound equipment to El Pueblo del Nino, Boga Crayo, and the Muscular Dystrophy Association. (Tr. 1151-1152.) Since 1978, Ruiz has worked with the Merchants of Naguabo to try to bring progress to the communities. He was once involved in collecting rice to be sent to Africa. He also participated in: "La Marcha del Carino" - for orphan children in 1986; the "Marcha No a las drogas" in 1987; and "Cruzada de Fe y Esperanza" in 1988. (Ruiz Ex. 1, p. 6.)

24. Ruiz has worked with Puerto Rican radio stations since 1980, primarily in connection with his sound business. Between 1980 and 1981, Ruiz made remote transmissions for WFAB-AM, Juncos, Puerto Rico, WALO-AM in Humacao, Puerto Rico, and WLID (formerly WSAN), Isla de Culebra, Puerto Rico. (Ruiz Ex. 1, pp. 1-2.) In making remote transmissions, he made the necessary connections and ran a test to determine that the remote transmitter was being received back at the station, but he did not actually broadcast these remotes. (Tr. 1100-1101.) He did one or two remotes a week for WLID from 1982 through 1985. (Ruiz Ex. 1, p. 2.) He periodically assisted the owner of WLID in the preparation of the program logs as they related to commercials. Also, he assisted Mr. Wifredo Blanco Pio, chief engineer for WLID, in changing all of the equipment of the main and recording studio to a new location. (Ruiz Ex. 1, p. 2.) In 1986, Ruiz made a remote broadcast for WKAQ(FM), San Juan, Puerto Rico, and has made remotes for WZOL, Luquillo, Puerto Rico, and station WMDD-AM in Fajardo, Puerto Rico. The WMDD remotes were for special occasions from 1986 through 1988 (for example at Christmas). (*Id.*) The remote broadcast for WKAQ(FM) in 1986 took place at various times over a two-day period. The remote broadcast for WMDD took place on 10 or 15 occasions between 1986 and 1988. (Tr. 1104.) Ruiz was either paid a flat rate or commission for his work. (Ruiz Ex. 1, p. 2.) Ruiz has never been employed by any radio station or held any position at a radio station. (Tr. 1116.) While Ruiz has produced radio programs on various occasions between 1979 and 1985 he was not, as noted, employed by any radio station. (Tr. 1117.)

Diversification

25. Mr. Ruiz holds no other media interests and has no other pending applications. (Ruiz Ex. 1, p. 7.)

Auxiliary Power

26. The proposed station will utilize auxiliary generating equipment to ensure continued operation in the event of a power outage. (Ruiz Ex. 1, 7.)

Hector Negroni Cartagena (Negroni)

Structure and Integration

27. Negroni is an individual applicant who proposes to serve full time as general manager of the station. He will work a minimum of 40 hours per week in that capacity. (Negroni Ex. 1, p. 1.) Negroni will terminate his employment as a minister of the Iglesia de dios Pentacostal, Marcos 16:15 Church and proposes to reduce the number of hours he is involved in his current activities as director of an evangelic movement, as necessary, to effectuate this commitment. (*Id.*) Negroni was born in Puerto Rico, and his parents are also both of Puerto Rican origin. (Tr. 1159-1160.)

28. As general manager, Negroni will oversee the construction and operation of the station and will have ultimate responsibility for all decisions affecting the operations of the station. (Negroni Ex. 1, p. 1.) He will hire department heads and oversee the hiring of other key station personnel. (*Id.*) Negroni will ultimately be responsible for all financial matters pertaining to the station. (*Id.*) The programming, administrative, promotional, and sales components of the station's operations will be under his supervision. (*Id.*) The ultimate decisions in those areas of operation will be made by Negroni consulting with the respective department heads. (*Id.*) Finally, he will be responsible for the administration of the station's EEO program. (*Id.*)

29. Negroni is an ordained minister by the Conciliate Defenders of the Faith. (Tr. 1186.) He is the pastor of a church located at the same address as his home. (Tr. 1189.) He is also the founder of a Pentecostal movement which currently has two churches, one in Caguas and the other in Santa Isabel, both of which are outside the service are. (Tr. 1190.) He is currently a director of the movement and will continue to be in the event he is awarded a construction permit. (Tr. 1191.) The movement will continue to attempt to establish churches, but he will not assist them. (Tr. 1192.) Negroni is not going to give up preaching the gospel if he gets the FM station, but only to leave the ministry as a pastor. (Tr. 1198.) If he gets the radio station, he will "preach through the station." (Tr. 1199.) He cannot state how many hours a week he would be preaching on the radio. (Tr. 1286.)

30. Negroni resided in Naguabo, Puerto Rico, as a child but has not lived in the area in the last 50 years. (Tr. 1199-1200.) He proposes to move to Naguabo if his application is granted. (Negroni Ex. 1, p. 2.)

31. In 1956, Negroni was employed full time by station WWRL-AM in Long Island, New York, as an announcer. He then went on to station WEVD(FM), New York, New York, and was employed at that station as an announcer from 1957-1958. In 1958, he came to Puerto Rico and worked as an announcer at station WITA (Radio Imparcial) through 1960. In 1961-1962, he returned to station WEVD in New York. He was in charge of writing programs and commercials and supervising the scheduling of programming commercials and was also an announcer. (Negroni Ex. 1, pp. 1-2.) He also supervised two other announcers in that position. (*Id.*)

32. In 1967, Negroni returned to Puerto Rico, and in January 1967 began working at station WLEY-AM, Cayey, Puerto Rico. From 1967 through 1968, Negroni worked as an announcer. He remained at station WLEY through 1968. In 1968, he began work at WNEL, Caguas, Puerto Rico, as a news announcer. At that same time, he worked part-time, weekends, as a booth announcer at Station WLII(TV), Channel 11, at Caguas, Puerto Rico. (Negroni Ex. 1.)

33. Negroni has met with and preached to drug addicts and other members of the community who have problems in Humacao, Naguabo, and Ceiba. Additionally, in 1985-1986, he was also involved in arranging for the services of a missionary on the outskirts of the town of Naguabo, and he helped establish a Bible school there. In conjunction with the missionary's work, he would go to Naguabo once or twice a week to preach and would assist the missionary in his work and visit various townspeople. This activity lasted until 1986. Since that time, approximately once every six months, he continues to preach at a city ward in Naguabo. (Negroni Ex. 1, pp. 2-3.)

Diversification

34. Negroni is currently the permittee of a new television broadcast station to operate on Channel 60 at Arecibo, Puerto Rico. (Negroni Ex. 1, 3.) He timely pledged to divest that interest when his application for Naguabo, Puerto Rico, is granted. (*Id.*) He does not own any interest in any other medium of mass communication. (*Id.*)[6]

Auxiliary Power

35. Negroni has proposed to provide emergency power generating equipment at his station's main studio and transmitter in order to permit uninterrupted service to his station's service area during power outages. (Negroni Ex. 2.)

Efrain Archilla - Diez (Archilla)

Structure and Integration

36. Archilla, an individual, will be the full time general manager of his proposed FM station, devoting more than 40 hours per week, on at least five separate days during each week. (Archilla Ex. 2, p. 1.) Archilla will make all employment decisions and will supervise all station employees. (*Id.*) He will be solely responsible for formulating and implementing all policies and procedures for all aspects of station operation, including programming, sales, administrative and technical matters. (*Id.*)

37. Archilla is Hispanic and has lived since 1973 in Humacao, Puerto Rico, approximately six miles from the town of Naguabo,[7] and within his proposed station's 1 mV/m contour. (Tr. 1565, 1647; Archilla Ex. 2, p. 1.)

38. Archilla is the treasurer and a director of Ochoa Broadcasting Corporation, licensee of WALO, Humacao, Puerto Rico, and of its parent corporation, Radio Oriental, Inc. He owns no stock in either corporation. In the event of the grant of his Naguabo construction permit application, he will sever all connections with WALO and both corporations and terminate his employment there as general manager. (Archilla Ex. 1.) WALO is owned by his father, who also owns WAMA, Tampa, Florida. (Tr. 1548-1549.) WAMA, Tampa is licensed in the name of Efrain Archilla Roig. (Tr. 1632.) Archilla provides technical consulting services for WAMA on an on-call basis. He has installed equipment, performed repairs, generated logs for programming, and assisted with the traffic and billing computerization. (Tr. 1549-1550.) Although the amount of time involved in this consulting work varies, Archilla estimated that he spent seven days at WAMA in 1988. (*Id.*) In the event he is the successful applicant, Archilla intends to continue his consulting arrangement with WAMA. (Tr. 1550.) According to Archilla, this work will not interfere with his full-time commitment to his proposed Naguabo station. (Tr. 1550.)

39. Archilla owns a 50 percent interest in a beeper business located in Humacao. (Tr. 652, 1592.) The business is primarily operated by his partner, but Archilla is responsible for the accounting of the corporation. (Tr. 1593.) The studios for Archilla's proposed station in Naguabo and the studios of WALO would be approximately six miles apart. (Tr. 1551.) WALO is a commercial station, and Archilla acknowledged that his station will in fact be in competition with the station owned by his father. (Tr. 1551.) Nevertheless, he has not discussed with his father the fact that the two would be in competition, and Archilla intends to cooperate with his father in minimizing the impact of his leaving WALO if and when his application is granted. Archilla informed his father of his plans to leave WALO by letter dated November 1, 1986. (Tr. 1551, 1601; Archilla Ex. 1, p. 1.) Archilla's father would have to spend more time in Puerto Rico if Archilla left WALO. (Tr. 1582.) However, up to this point, his father has not taken any steps to replace him. (Tr. 1601.) Archilla's father sometimes resides in Puerto Rico which is his legal residence, but at times his father also resides in Tampa. (Tr. 1641.)

40. Archilla's past broadcast experience started in 1968 when, at the age of 15, he obtained his Third Class Radiotelephone Operator's License and began part-time work as a control room operator for WMNT in Manati, Puerto Rico. (Tr. 1599; Archilla Ex. 2, p. 6.) He obtained his First Class Operator's License in 1970 at age 17 and became a transmitter operator for WKVM in San Juan, Puerto Rico. He resigned his position at WKVM in 1973 to become station manager of WALO in Humacao. (Archilla Ex. 2, p. 6.) Three years later, in 1976, Archilla became general manager of WALO and has since worked there full time as general manager in charge of all station operations. (Archilla Ex. 2, p. 6.)

41. Archilla currently holds a lifetime General Radiotelephone Operator's License, and is a senior member and certified technician of the National Association of Business and Educational Radio and of the Association of Communications Technicians. (Archilla Ex. 2, p. 6.)

42. Archilla redesigned WALO's programming in 1974. (Archilla Ex. 2, p. 6.) He first increased the number of WALO's broadcast hours from 16 to 19 hours daily; then he created a news department with a full time news director. (*Id.*) Archilla installed two-way radio equipment at the police station which permits direct communications with WALO. (Archilla Ex. 2, p. 7.) Archilla also maintains relationships with community leaders in Humacao and other nearby towns and has reporters there to keep abreast of current events. (*Id.*) Archilla installed weather equipment at WALO, maintains a dedicated radio tuned to the NOAA weather station, and arranged for WALO to maintain a two-way transmitter in the regional Civil Defense office during weather emergency situations. (*Id.*)

43. From 1978 to 1982, Archilla served as eastern area regional director for the Puerto Rico Radio Broadcasters' Association. (Archilla Ex. 2, 2.) He served as vice president from 1982 to 1984 and became president of the association in May 1989. (Archilla Ex. 2, pp. 1-2.) From 1987 to the present, Archilla has served as Service Sector Area Director of the Puerto Rico Manufacturers' Association, Humacao Chapter, which includes Naguabo. (Tr. 1567-1568; Archilla Ex. 2, p. 2.) WALO pays Archilla's dues to this organization. (Tr. 1563.) In 1987, he was named Service Sector Executive of the Year for the Humacao region of the association. (Archilla Ex. 2, p. 2.) From 1986 to the present, Archilla has served as secretary for the community and Police Committee for the Humacao District, which provides a liaison between the police and the citizens. (Tr. 1568-1569; Archilla Ex. 2, p. 2.)

44. Archilla is a founding member and secretary of the Eastern Foundation for Art and Culture, founded in 1984 to develop cultural and civic projects in eastern Puerto Rico. (Tr. 1569-1570, 1597; Archilla Ex. 2, p. 3.) He is a charter member of the Advisory Committee for the Humacao Foundation for Disabled and Retarded Children which was formed in 1988. (Tr. 1570-1571; Archilla Ex. 2, p. 3.) From 1986 to the present, Archilla has been one of four community representatives serving on the board of directors of the Board of Trustees of the Roig House Museum and Center for the Arts of the Humacao College of the University of Puerto Rico. (Tr. 1573; Archilla Ex. 2, p. 3.) He has also been a member for several years of the Aguedo Mojica Permanent Advisory Committee for the college and engages in legislative lobbying, fund raising, and other activities on behalf of the college. (Tr. 1574, 1598; Archilla Ex. 2, p. 4.) The committee meets every three months. (Tr. 1574.) The college serves Naguabo and other communities in eastern Puerto Rico. (Archilla Ex. 2, p. 4.) Archilla is also a founding member of the Fund for Restoration and Preservation of Humacao's Parish Church. (Tr. 1575-1576; Archilla Ex. 2, p. 4.) This organization meets every six months. (Tr. 1576.)

45. In 1985, Archilla was a member of the Advisory Committee for Humacao Community College and worked as a liaison between the college and the community. (Archilla Ex. 2, p. 4.) The college operates two campuses, one in Humacao and one in Fajardo, and serves students from nearby towns including Naguabo. (*Id.*) The committee had approximately two meetings in 1985. (Tr. 1599.) From 1980 to 1983, Archilla was a member of the Puerto Rico Coastal Zone Management Advisory Committee of the National Oceanographic and Atmospheric Administration. (Archilla Ex. 2, pp. 4-5.) From 1977 to 1985, Archilla was the Board of Directors' Coordinator for the Association for the Improvement of the Environment. (Archilla Ex. 2, p. 5.) In this capacity, he headed the association's effort to save the Humacao Lagoon System. (*Id.*) Archilla is not now, nor has he ever been, a member of any civic organization headquartered in Naguabo. (Tr. 1567.) If his Naguabo application is granted, Archilla will continue his civic activities to the extent that they do not interfere with his full time integration commitment to his proposed radio station. (Archilla Ex. 2, pp. 5-6.)

Diversification

46. As previously noted, Archilla is the treasurer and a director of Ochoa Broadcasting Corporation, licensee of WALO, Humacao, Puerto Rico, and of its parent corporation, Radio Oriental, Inc. If he is the successful applicant in this proceeding, Archilla will sever his relationship with the above corporations by resigning from his positions as officer and director, and he will terminate his employment with WALO as general manager. (Archilla Ex. 1, 1.) Archilla has no ownership interests or connection with any other medium of mass communications. (*Id.*)

Auxiliary Power

47. Archilla will install auxiliary power diesel generators at his studio and transmitter sites in order to continue broadcasting in the event power is lost at either location. (Archilla Ex. 3.)

Comparative Coverage

48. The following table lists the total area and population within each applicant's 1 mV/m contour.

Applicant	Area (Sq. Km.)	Population
Blanco (Original)	**603**	**155,608**
Blanco (Amended)[8]	871	204,641
Negroni (Original)	**470**	**101,595**
Negroni (Amended)[9]	533	130,723
Archilla (Original)	**697**	**158,711**
Archilla (Amended)[10]	1,024	252,571
Ruiz	**803**	**186,442**
NBC	**919**	**210,365**

(Joint Ex. 1, Table 6.)

49. A "significantly greater" number than five, full-time aural stations provide service to the entire proposed coverage area of each applicant. (Joint Ex. 1, Engineering Statement, p. 3; and Table 7.)

BASIC ISSUES

Section 73. 207 Issue (Short Spacing and Waiver)

50. NBC, Blanco, Archilla, and Ruiz each propose transmitter sites that are located less than the required 163 kilometers from station WTPM(FM), Aguadilla, Puerto Rico.[11] (NBC Ex. 1-B; Blanco Ex. 7; Archilla Ex. 4; Ruiz Ex. 3.) Consequently, each requests a waiver of Section 73.207 of the Commission's rules.

51. NBC, Blanco and Archilla propose to locate their respective transmitters at the same geographical coordinates: 18^0 16' 49" N 65^0 40' 12" W. (Joint Ex. 1, Tables

1B, 3B, and 5.) From that location, each will be short-spaced to WTPM(FM) by 3.0 kilometers. (NBC Ex. 1-B, p. 4; Blanco Ex. 7, 2; Archilla Ex. 4, p. 2.)

52. To fully comply with the Commission's separation requirements, the Naguabo site must be located at least 163 kilometers from co-channel station WTPM at Aguadilla, Puerto Rico. The site, therefore, must be located along the eastern coast of the island in the area outside the protection radius to WTPM. The Roosevelt Roads Naval Station is located in the southeastern portion of the permissible site area for the facility and occupies approximately one-half of the permissible fully-spaced area. Based on communications with officials of the Naval Station, none of the government's property would be available for the radio site. (NBC Ex. 1-B, 2; Negroni Ex. 11, p. 1.)

Naguabo Broadcasting Company (NBC or Resto)

53. Francisco Resto Torres wrote a letter to Captain Clime, Commanding Officer of the Roosevelt Roads Naval Station on January 2, 1987, to determine whether a tower site could be located on the property of the Naval Station. In response, Resto received a letter dated January 8, 1987 from J. B. Venable, Public Works Officer. Mr. Venable's letter indicated that no property on the base would be available. After receiving the letter from Venable, Resto contacted Cesareo C. Nieves, the realty specialist he was referred to by Venable, who confirmed what Mr. Venable had stated, *i.e.*, that there was no property available within the boundaries of Roosevelt Roads Naval Station which could be used for an FM tower site. (NBC Ex. 1-A, pp. 1-3.)

54. NBC originally proposed a site that was fully-spaced with respect to WTPM. However, it was later determined that terrain obstructions between the site and the city of license would prevent line-of-sight coverage. (NBC Ex. 1-B, p. 2.) A second site was sought by NBC. It appeared, at first glance, that the Channel 225A site could be located north of Roosevelt Roads, be fully spaced, and provide the necessary city-grade signal over Naguabo. However, such is not the case. The elevation of potential sites in the permissible area north of Roosevelt Roads is much lower than the terrain just west of the permissible area, as well as the terrain between the permissible area and the city of Naguabo. Sites in the permissible area would be obstructed by peaks such as Cerro Corozal, elevation 304 meters (NBC's currently proposed site); Chupacallos and Daguao with peaks to 320 meters; Mariana (near El Banco) with peaks to 240 meters; and near Hacienda Grande with peaks to 130 meters. In addition, the northern portion of the permissible area approaches yet another airport, Fajardo Field. (NBC Ex. 1-B, p. 3.)

55. NBC sought to locate a site as close as possible to the fully spaced area while, at the same time, permitting the required line-of-sight city coverage. It was decided that the pending Cerro Corozal site at 304 meters above mean sea level provided the best compromise. The proposed NBC site, as noted, would create a short-spacing of 3.0 kilometers with respect to WTPM. The Cerro Corozal site appeared to NBC to provide the best compromise between the proposal's location and the ability to provide the required obstruction-free service to Naguabo. (NBC Ex. 1-B, p. 4.)

56. As explained by Kenneth Larkin, Jr., NBC's consulting engineer:

> [T]here exists a complex link in this proceeding between an applicant's tower location and its ability to satisfy the Commission's policy of requiring a minimum signal strength of 70 dBu over 80% of the community of license. In other words, it appears that there is no transmitter site available for the Naguabo channel 225A assignment that would meet both the Commission's mileage separation requirements as well as the city coverage requirements.
>
> (NBC Ex. 1-B, p. 1.)

Jorge G. Blanco Galdo (Blanco)

57. According to Blanco's consulting engineer, Peter Gureckis, the only available site that would be fully spaced to WTPM(FM) and provide unobstructed service to Naguabo is located within the boundary of the U.S. Naval Station at Roosevelt Roads and is unavailable. (Blanco Ex. 7, pp. 1-2.) In his view, Blanco's proposed site represents an "optimum between minimizing the short-spacing to station WTPM[FM] and providing a city-grade signal to Naguabo." (Blanco Ex. 7, p. 3.) Gureckis acknowledged that there is a slight break in the line-of-sight between the amended Blanco site and Naguabo on the bearing 223.5 degrees. However, according to Gureckis, "a propagation study utilizing Technical Note 101 indicates that a signal greater than 70 dBu will be placed into Naguabo." (Blanco Ex. 7, p. 3.)

Efrain Archilla - Diez (Archilla)

58. Archilla's site provides city grade service to Naguabo and has obtained FAA approval, but as previously noted, it is short spaced to WTPM(FM) in Aguadilla by 3.0 km. It is the professional opinion of Archilla's consulting engineer, Mr. Purcell, that there is no available transmitter site that will: (a) provide clear line-of-site to Naguabo; (2) meet the spacing requirements to WTPM(FM); and (3) receive FAA approval. (Archilla Ex. 4, 4.) According to Purcell, it is his professional opinion that the site proposed by Archilla is the least short-spaced site of those that are available. (Tr. 1826.) Moreover, according to Purcell, Archilla's proposed site "provides clear, unobstructed service to all of Naguabo ." (Archilla Ex. 4, p. 4.)

Reyes Ruiz Rivera (Ruiz)

59. Initially, Ruiz secured a site in the vicinity of Ceiba which met all spacing requirements. When terrain profiles were prepared for that site, it became evident that major terrain obstructions would prevent line-of-sight to Naguabo and the required 70 dBu signal would not be placed over Naguabo due to heavy terrain shielding. (Ruiz Ex. 3, p. 1.) His technical consultant, Serge Bergen, concluded that fully-spaced sites not located on the U. S. Naval Air Base were completely nonviable due to terrain shielding. (Tr. 1787; Ruiz Ex. 3, p. 1.) Thus, Bergen further concluded that Ruiz was faced with a choice of either complying with the city-grade coverage rule or the minimum spacing rule, it being impossible to comply with both. Mr. Bergen directed Mr. Ruiz to find a site which would first of all meet the line-of-sight requirement and accede to the possibility that it may be slightly short spaced. (*Id.*) In Mr. Bergen's professional opinion, a site which is slightly short spaced is less important than placing the required city-grade contour over the community of license.

60. Ruiz undertook to find a site located in a narrow sector, from which a clear line-of-sight exists to Naguabo, as based on his personal observation. The selected site meets all the requirements of Section 73.315 of the Commission's rules, but is 3.4 km short spaced to Channel 225B located in Aguadilla, Puerto Rico. (Ruiz Ex. 3, p. 1.) Bergen did not advise Ruiz to look at any sites proposed by the other applicants and was not guided by the other applicants' selection of sites. According to the information given Bergen by Ruiz, this was the only site that would provide line-of-sight coverage. (Tr. 1785.) Ruiz looked at numerous sites and assured Bergen that this was the best site he could find. (Tr. 1786.)

61. Mr. Bergen received a copy of the amended site submitted by Blanco. As a result of his study of that site, he did not recommend the Blanco site because, in his opinion, there is an obstruction to Naguabo. (Tr. 1789-1790.) However, Bergen acknowledged that if Blanco's engineer's computations were correct, then a 70 dBu contour would be placed over Naguabo. (Tr. 1792.) Bergen did not double check Blanco's engineering computations. (Tr. 1792.)

62. With regard to the significance of Ruiz' selection of a site 0.4 kilometers more short spaced than the site selected by the other short-spaced applicants, Serge Bergen, Ruiz' consulting engineer, opined that:

> [T]his is unimportant when talking about the 2% of the required spacing which is 163 kilometers. If you talk about 3.4 kilometers short spaced or 3 kilometers and 2 kilometers, percentage-wise, in the engineering, and technically it makes practically no difference at all.
>
> (Tr. 1788-1789.)

The Ruiz site meets all of the requirements of Section 73.315 of the Commission's rules. (Ruiz Ex. 3, p. 1.)

Jorge G. Blanco Galdo (Blanco) - Section 73.315(a) Issue

63. Blanco originally specified a site short-spaced to WTMP by 1.775 kilometers and sought a waiver of Section 73.207 of the Commission's rules. Blanco's originally specified site was approximately 5.8 miles northeast of Naguabo. The terrain in the area is mountainous, and two major obstructions are situated between the site and the community. Accordingly, Blanco's engineer prepared a propagation study utilizing the National Bureau of Standards Technical Note 101 (Tech Note 101). That study indicated that on the relevant bearing, a signal of 65.68 dBu would be placed at the boundary of Naguabo nearest to the transmitter site and 68.28 dBu at the Naguabo boundary furthest from the transmitter site. Accordingly, Blanco requested waiver of Section 73.315(a) of the rules. (Blanco Ex. 7, pp. 1-2.)

64. As discussed previously, Blanco subsequently sought to amend his application to specify the Amaro site. (Tr. 1799.) From the Amaro site, Blanco's predicted 70 dBu contour more than encompasses Naguabo. (Blanco Ex. 14.) There is, however, a slight break in the line-of-sight from the site to Naguabo on the bearing of 223.5 degrees. Accordingly, Blanco's engineer prepared another Tech Note 101 study. That study indicates a signal of greater than 70 dBu will be placed into Naguabo. Specifically, the study shows that a signal of 78.58 dBu would be placed at the Naguabo boundary closest to the transmitter site and 83.37 dBu at the Naguabo boundary furthest from the transmitter site. (Blanco Ex. 7, p. 3.)

Hector Negroni Cartagena (Cartagena) - Section 73.315(a) and (b) Issues (Coverage of principal city and major obstruction.)

65. Using the computational method prescribed in NBS Technical Note 101, Ruiz' engineering study established that, on the basis of three radials (one of which had been chosen by Negroni), the field Negroni's proposal would provide over all of Naguabo would be substantially less than the required 70 dBu (Section 73.315(a)). The lowest predicted field was 38.5 dBu and the highest was 49.9 dBu. Thus, Negroni's proposal fails to comply with Section 73.315(a) of the rules in addition to the admitted nonconformance with Section 73.315(b). (Ruiz Ex. 4, pp. 1-2.)

66. Negroni's technical consultant, John A. Lundin, acknowledged that nowhere in the Commission's rules does 50 microvolts constitute usable FM service. (Tr. 1873.) In asserting that his predicted 70 dBu (translator generated) contour encompasses the entire community of Naguabo, Negroni did not use the boundaries of Naguabo depicted by the 1980 Census. (Tr. 1874.) Instead, the city boundaries utilized were transferred from a map that Negroni provided. Lundin did not know the origin of the map. (Tr. 1875.) Lundin is not certain of the difference between a municipality, a pueblo and a town in Puerto Rico. (Tr. 1876.)

67. Negroni proposes to employ an FM translator station to overcome any terrain blockage problem and to "fill in" the gaps in city coverage. (Negroni Ex. 10, p. 7.) Assuming that a translator was not employed to "fill in" the gaps in city coverage, the percentage of the community that the station would cover would probably be zero. (Tr. 1876.) From the location proposed, the signal would be totally obstructed. Lundin expressed doubt that any part of the community would receive a 70 dBu signal. (Tr. 1877.)

68. Negroni's proposed translator station technically could be fed programming from the primary station either directly by microwave transmission or by off-air reception. (Tr. 1877-1878.) However, the Commission's rules do not presently permit translator stations to receive input via direct microwave transmissions, the preferred method contemplated by Negroni. (Tr. 1877-1878). Further, Negroni does not now have pending before the Commission an application to construct his proposed new FM translator station, and the Commission has imposed a freeze on the acceptance of applications for new commercial FM translator stations. (Tr. 1870.) In addition, while Negroni's engineering exhibit provides a terrain profile to show lack of interference between his theoretical translator and co-channel WZNT(FM), San Juan, Puerto Rico, the exhibit does not take into account the possibility that WZNT(FM) may change its antenna site or otherwise modify its facilities. (Tr. 1871-1872.) Since a translator is a secondary service under 47 C.F.R. Section 74.1203, WZNT(FM) will always have priority over Negroni's theoretical translator. In the event of interference to WZNT(FM), Negroni's Naguabo translator would be ordered off-the-air under Section 74.1203. As previously noted, absent the use of a translator, Negroni would not place a 70 dBu signal over any part of the city. (Tr. 1876-1877.)

69. Lundin did not select Negroni's site; Negroni did. Negroni considered other sites, including the sites that the other applicants proposed. (Tr. 1869-1870.) It was Negroni's decision to select this particular site notwithstanding the coverage shortcomings. Lundin discussed all the facts with Negroni, who made a conscious decision to use this site and that was the direction Lundin was given. (Tr. 1879.) Negroni opted to resolve the short spacing rather than the coverage problem. (Tr. 1880-1881.) Lundin explored with Negroni the possibility of utilizing one of the sites selected by other applicants, but these were rejected. Lundin did not tell Negroni not to use the site, but he told him what problems there would be if he did so. Lundin considered the problems presented by Negroni's site to be serious. (Tr. 1880.)

Issues Against Hector Negroni Cartagena (Negroni) and Jorge G. Blanco Galdo (Blanco) Regarding Blanco's Originally Specified Site

70. These issues were added as a result of petitions to enlarge issues filed by both Negroni and Blanco. Because the facts are interrelated, they will be combined herein. Specifically, on September 9, 1988, a motion to enlarge the issues was filed by Negroni against Blanco. In that motion, it was alleged that Blanco had never obtained "reasonable assurance" of the availability of his initially proposed 153-foot tower proposal from the owner of the site designated in his application. Blanco opposed the motion, and on September 30, 1988, filed a motion to enlarge issues against Negroni alleging that the declaration supporting Negroni's motion was a fraud in that the declarant (Domingo Rodriguez Marin) never signed the document. Negroni responded by presenting the declarations of three witnesses declaring that Mr. Marin executed the document (by placing an "x" mark), along with a further declaration from Mr. Marin in which Mr. Marin recanted the statement which he had provided to Blanco and affirmed that he did, indeed, sign a declaration in December 1986 for Negroni, and that the statements in the December 1986 declaration were, indeed, accurate.

71. In early October 1986, Blanco asked his father, Wifredo Blanco Pi (Blanco Pi) to accompany Raisaac Colon Rios (Colon) when Colon went to meet the owner of a prospective transmitter site.[12] Blanco asked his father, who is an experienced broadcast engineer, to accompany Colon because Blanco was in Laurel, Maryland, preparing to take an engineer-in-training examination that was to be given on October 31, 1986.[13] (Blanco Ex. 2, p. 1.)

72. Blanco Pi and Colon met with Domingo Cruz Marin on two occasions in October 1986.[14] (Tr. 258.) At the first meeting, Blanco Pi discussed with Marin the construction of a tower and made a preliminary study of Marin's land for installation of a tower and transmitter building. According to Blanco Pi, there was discussion of how tall the tower was going to be and also that a small building would be constructed. (Tr. 259-260.) After speaking with Marin in the house, they went outside and, according to Blanco Pi, he explained to Marin that the tower would have to have a height of at least 150 feet to clear the mountain that can be seen from Marin's house. (Tr. 260.) Blanco Pi took rough measurements by stepping off the distance in order to see if the tower could be installed. (Tr. 260.) Blanco Pi also pointed out to Marin the towers installed on the nearby Navy base (*i.e.*, Roosevelt Roads Naval Station). (Tr. 261.) Blanco Pi told Marin that the final decision had to be made by his son, Blanco. (Tr. 261.)

73. Colon and Blanco Pi returned to see Marin on October 7, 1986. (Blanco Ex. 3, p. 1.) According to Blanco Pi, they specifically mentioned to Marin that a transmitter building and a tower approximately 150 feet in height would be constructed, and that the tower would be supported by guylines. (Blanco Ex. 3, p. 1.) Marin again accompanied Blanco Pi as he walked around the property. (Tr. 262.) In fact, Marin was present when Blanco Pi took photographs of his land. (Tr. 263-264; Blanco Exs. 8, 9.) The proposed tower was to be located approximately 15 yards from Marin's house. (Tr. 265.) During the October 7, 1986, visit, Colon and Blanco Pi reduced to writing the agreement reached with Marin. The handwritten agreement provided as follows:

> The undersigning, DOMINGO CRUZ RODRIGUEZ, states the following:
>
> 1. That I am of legal age, married and resident in Barrio Aguas Claras, Sector El Corcho, Ceiba, Puerto Rico. Social Security Number [. . .].
>
> 2. That my residence is located inside a two and a half acre plot of land that my three brothers and I inherited from our parents: Estanislao Cruz Rodriguez and Francisca Marin, both defunct.
>
> 3. That one fourth of the above described property is my part of the heritage and where my residence has been located for more than thirty years.
>
> 4. That I have authorized Mr. Raisaac G. Colon Rios and Mr. Jorge G. Blanco Galdo to propose this site to the Federal Communications Commission for a project to construct a radio station.
>
> 5. That if the project is approved Mr. Colon and Mr. Blanco will pay me a monthly rent of $100.00 (one hundred dollars) form [sic] the date of installation of the tower and transmitters at my property.
>
> 6. That if for any reason the tower and transmitters are not installed at my property Mr. Blanco and Mr. Colon will not be obliged at all with the undersigning.
>
> 7. That if they are installed, the duration of this contract would be for ten years, being in liberty to Mr. Blanco and Mr. Colon of retiring the installation at their own will. If they do so they should pay me $500.00 (five hundred dollars) as compensation.
>
> 8. That at the time this authorization is being signed I am receiving the quantity of $50.00 (fifty dollars) for the inconveniences and concession I hereby make.
>
> 9. That I sign with the following cross mark.

WITNESSES:

WIFREDO G. BLANCO PI	DOMINGO CRUZ RODRIGUEZ (X)
RAUL SANTANA TAPIA (SS [. . .])	RAISA A. G. COLON

(Blanco Ex. 3, pp. 3-5.)

74. The October 7, 1986, agreement is in Blanco Pi's handwriting. It was read to Marin, who can neither read nor write, by his neighbor, Raul Santana Tapia (Santana). (Tr. 357-358.) Marin then put his cross mark on the document. Also witnessing the document were Blanco Pi, Colon and Santana. (Blanco Ex. 3, pp. 3, 4.) Marin placed his cross mark on both pages of the agreement. The witnesses, in addition to signing the second page, initialed the first page. (Blanco Ex. 3, pp. 3-4.)

75. Blanco returned to Puerto Rico from the Washington, D.C., area in November 1986. After he returned, he went with his father to visit the transmitter site and to introduce himself to Marin. (Blanco Ex. 4, p. 2.) When Blanco and Blanco Pi arrived at Marin's property, Marin and his wife were there. Blanco Pi introduced Blanco to Marin. The initial greetings took place outside the home; the conversation then continued inside for a time. They discussed the agreement that had been reached in October. (Tr. 809.) After a while, Marin, Blanco and Blanco Pi went outside to look at the terrain of the proposed site. (Tr. 810.)

76. In Marin's presence, Blanco and Blanco Pi discussed the project. Blanco Pi showed Blanco where the tower base would be, in which direction Naguabo was located, and where the guylines would be anchored. Marin accompanied Blanco and Blanco Pi as they surveyed the land. The visit took about an hour or perhaps a little less. (Tr. 810-812.) According to Blanco, they discussed the mountain that stands in the way between Marin's site and Naguabo, and that a tower of approximately 150 feet would help overcome that mountain as much as possible. (Tr. 882.) The conversation was primarily for the benefit of Blanco and Blanco Pi, but because Marin was present, they discussed matters in a manner that permitted Marin to understand the conversation and Marin, from time to time, participated in the conversation. (Tr. 882-883.)

77. Between the November 1986 visit and September 14, 1988, Blanco does not recall having spoken to Marin. (Tr. 813.)

78. Mr. Marin first met Reverend Hector Negroni Cartagena in early December 1986, several months after Marin met with Blanco Pi and Colon. (Negroni Ex. 4, p. 1; Negroni Ex. 8, pp. 1, 8.) At that time, Marin told Negroni about certain conversations he had with a man who identified himself as Jorge Blanco. (Negroni Ex. 8, pp. 1, 8.) Negroni asked Marin if he would execute a declaration summarizing the information they had discussed. Marin agreed to do so. (Negroni Ex. 4, pp. 1-2; Negroni Ex. 8, pp. 1, 8.) Marin next met with Reverend Negroni on December 27, 1986. Marin's niece, Sandra Ivette Encarnacion Rivera and Ada Luz Matias, Negroni's secretary, were also present at the meeting. (Tr. 1705; Negroni Ex. 4, p. 2; Negroni Ex. 8, pp. 1, 8.)

79. At this second meeting, Negroni had a declaration which was prepared by his attorney based upon information Marin had provided during the first conversation. (Negroni Ex. 4, p. 2; Negroni Ex. 8, pp. 1, 8.) Because Marin cannot read, he asked his niece, Sandra Ivette Encarnacion Rivera, to read the Spanish version of the declaration to him. (Tr. 71, 1706; Negroni Ex. 4, p. 2; Negroni Ex. 7, pp. 1, 7; Negroni Ex. 8, pp. 1, 8.) Once she had read the declaration to Mr. Marin in Spanish,[15] he asked the woman who was with Negroni, Ms. Matias, to write out his name for him because he also cannot write. After Ms. Matias wrote Marin's name in cursive, Marin placed his signature (an "x" mark) next to where she had written his name on the documents. Marin also placed an "x" mark on the English-language version of the document. Mr. Marin's niece signed her name as a witness. (Tr. 125-126, 129, 606, 608, 1323, 1706; Negroni Ex. 4, p. 2; Negroni Ex. 6, pp. 1, 7; Negroni Ex. 7, pp. 1-2, 7; Negroni Ex. 8, pp. 1-2, 8.) There was no indication that someone other than Marin had signed his signature, and it was not revealed that Marin could not read or write. (Tr. 1327.) Those declarations are the ones filed with the Commission in Negroni's September 9, 1988, motion and is the document which Blanco claimed (in his September 30, 1988, motion) was a forgery. (*Compare*, Negroni Ex. 4, Attachments A and B, and Negroni's September 9, 1988, motion, Attachment 3.)

80. The text of the Spanish-language version of the Marin declaration extended for one and one-third pages. Although more than sufficient room existed on the second page for the signature lines and date blocks, they appeared on a third page. The fourth page was a map apparently depicting the transmitter sites of various applicants. It was a different map than attached to the English-language version of the declaration. The declaration reads as follows[16]:

> I, Domingo Cruz Rodriguez, do hereby declare and state as follows:
>
> 1. My family and I are the owners of a home, and behind the home is a piece of land 300-400 square meters in size, located at a site approximately 5.8 miles northeast of Naguabo and west of Highway 3, located at the spot identified on the attached map.
>
> 2. It is my understanding that an applicant before the Federal Communications Commission, Jorge G. Blanco Galdo, designated my land as the proposed site for the transmitter tower of a new radio station. I was visited in October 1986 by a man who appeared to be in his fifties, and who identified himself as being Jorge Blanco. At that time, we discussed the availability of the land located behind my house for use as the location of a transmitter tower. That man said that he needed to construct a tower approximately ten feet in height for his station. We agreed that to use that piece of land, he would pay me $200/month. Two weeks later, he visited me again and brought someone who he said was his son. At that time, the older man gave me $50. We did not enter into any lease or negotiate any other lease terms. I have not been in contact with either the man who identified himself as being Jorge Blanco or his son since that time.

[Page Break]

3. I have since learned that Mr. Blanco Galdo has proposed to construct a structure 153 feet in height on that piece of land. Mr. Blanco Galdo and I never discussed whether I would allow construction of a tower of that height on my land. I would have told him that I never would allow a tower of that height to be built upon my land, especially because it would be so near my home.

[Page Break]

I declare, under penalty of perjury, that the foregoing is true and correct.

[*Cursive Signature*] [*Mark: X*]
Domingo Cruz Rodriguez

Signed and dated this *Saturday 27* day of *December* 1986.

Sandra L. Encarnacion Rivera [Signature]
Witness

Signed and dated this *Saturday 27* day of *December* 1986.

(Negroni Ex. 4, Attachment A; Negroni Ex. 13, pp. 6-7 (certified translation).)

81. According to Negroni, the execution and witnessing procedure he used in connection with the Marin declaration was consistent with the method he used in other cases. (Negroni Ex. 4, p. 2.) Specifically, he was a special agent for the Puerto Rico Treasury Department in the Office of Special Investigation. (Negroni Ex. 4, p. 2.) While he was a special agent, there were times he arrested persons who did not know how to read or write. (*Id.*) The established procedure in those cases was for the person who was arrested to sign a statement concerning what had occurred with a cross (an "x" mark) and for Negroni to sign his name next to the cross. (Tr. 1320-1321; *Id.*) That same procedure was used in the case with Marin. Although there have been situations where Negroni has signed documents for others, and indicated that he signed for that person, Negroni stated that he was not aware that such a procedure had to be followed for the Commission. (Tr. 1326.)

82. After Blanco learned that Negroni had submitted to the FCC a declaration purportedly from Marin stating that Blanco did not have permission to build his proposed tower, Blanco was surprised and sought to find out from Marin what the true facts were. Blanco and Blanco Pi met with Marin and his wife on September 14, 1988. On the basis of what Marin told Blanco, Blanco wrote out by hand and read to Marin a declaration on which he placed his cross mark. (Blanco Ex. 4, p. 3.) The declaration read as follows:

I, Domingo Cruz Marin, married and residing in Aguas Claras, Ceiba, Puerto Rico, state the following:

THAT, the only signature using a cross that I gave to anyone was on a paper authorizing Mr. Raisaac Colon to install a tower for a radio station; Mr. Colon was introduced to me as the son of J. C. Colon, owner of the radio station in Culebra. While signing, I recall that Raisaac Colon made a check for $50.00 dollars, which he cashed for me.

The tower's installation was explained to me, as well as its height and its construction. Since that day I have not signed any document with anyone pertaining to the matter.

I remember that shortly afterward a man from Caguas came to see me at home. I do not recall his name at the moment but he introduced himself as a pastor from a church in Caguas. At that time, he came with a young woman, of dark skin and long black hair. He told me she was a missionary for the Church.

He asked me how it was possible that I allowed the site to be used for a mundane radio station instead of a Christian radio station. I told him it could not be used for anything else since I had already reached an agreement with Raisaac Colon.

I remember that when I signed the paper with Raisaac Colon, Mr. Blanco, who drafted the paper and co-signed it, was also there.

Until this day, September 14, 1988 at 7:22 p.m., I have not signed any papers related to the agreement reached with Mr. Colon, with the Pastor from Caguas or with anyone else since the agreement was made.

I am willing to prove, wherever necessary, that I have not signed any papers pertaining to the deal made with Mr. Raisaac Colon about the installation of the radio tower on my land.

The above, handwritten by Mr. Jorge Blanco was read to me and I agree that it represents what I said to him. My wife, Ana Delia Matos Santana, was also present and heard the reading of the document.

I hereby sign with a cross as my signature.

This document is of three pages.

X [*Cross Mark*]
Domingo Cruz Marin

[*Signature*]
Ana Delia Matos Santana

[*Signature*]
Jorge G. Blanco Galdo

[*Signature*]
Wifredo G. Blanco Pi

(Blanco Ex. 4, pp. 6-8; Blanco Ex. 11, pp. 9-10 (certified translation).)

83. One of the three witnesses, Ana Delia Matos Santana, is Marin's wife. The three witnesses signed each page of the declaration. Marin placed his cross mark on each page of the declaration. (Tr. 273-274, 816; Blanco Ex. 4, pp. 3, 6-8.)

84. As of his September 14, 1988, visit to Marin's house, Blanco had not yet received a copy of Negroni's "Petition to Enlarge Issues" or the attached declaration purportedly signed by Marin. (Tr. 888-890.) When Marin was asked about the declaration, he told Blanco that he (Marin) had not signed any type of document for anyone except for Colon and Blanco and not anything for the "Reverend from Caguas" (*i.e.*, Negroni). (Tr. 814.)

85. After the September 14, 1988, statement had been obtained, Blanco and Blanco Pi discussed whether they should have the declaration notarized. It was decided that course of action would be best. The problem was that in order to have the declaration notarized, one would have to go to the nearby city of Fajardo and get a notary. The whole process would take a day, perhaps more. At the time, Blanco had just started a new job at Motorola and did not wish to miss another day of work. Blanco Pi said that he would go to Fajardo and make the arrangements. Blanco Pi then got in touch with an attorney, Clara Robles Calderon (Robles Calderon). (Tr. 874-875; Blanco Ex. 4, pp. 3-4.) Blanco Pi picked up Robles Calderon in Fajardo. They then went to Marin's home. After a conversation with Marin regarding the circumstances, Blanco Pi took the attorney back to her office where a declaration was prepared. (Tr. 322.) Blanco Pi and the attorney then returned to Marin's residence. By the time they arrived, it was almost night, and it was raining hard. (Tr. 276, 322-323.) Robles Calderon then read the document to Marin. Marin placed his "x" mark and his fingerprints on the document. The document was also witnessed by the neighbor, Santana, who was present. (Tr. 278; Blanco Ex. 5, p. 2.) The declaration of September 15, 1988, reads as follows:

> I, *DOMINGO CRUZ MARIN*, of legal age, married, landowner and resident of Ceiba, Puerto Rico, hereby STATE, under oath:
>
> THAT my name and other personal information previously stated are correct.
>
> THAT the purpose of this Sworn Deposition is to to state under oath the following facts:
>
> 1. For purposes of identification my Social Security number is [. . .].
>
> 2. On October 7, 1986, Mr. Raisaac G. Colon Rios visited my property and, by means of an Oral Agreement I accepted to allow the installation of towers and transmitters, necessary to the operation of the aforementioned radio station, provided the application for a radio station meets with approval, on my property, which I have had in my possession for more than thirty years and where my residence is located, this land being the property of the Cruz Marin Inheritance.
>
> 3. On October 7, 1986, I agreed to the fact that, should the aforementioned approval be granted, Messrs. Raisaac G. Colon Rios and Jorge G. Blanco Galdo would enter into an agreement with me whereby I would sign a Lease Contract for monthly payments of $100.00 (one hundred), beginning with the installation of the tower and the transmitters on my property.
>
> 4. The term of the aforementioned Lease Contract will extend over a period of ten years.
>
> 5. In the event that the tower and the transmitters have to be moved from my property I would receive a compensation fee of $500.00 (five hundred), and the contract would be annulled.
>
> 6. To this end, I received $50.00 (fifty), from Messrs. Raisaac G. Colon Rios and Jorge G. Blanco Galdo, as a deposit for the installation of the towers and transmitters.
>
> 7. I hereby ratify the agreement reached with Messrs. Raisaac G. Colon Rios and Jorge G. Blanco Galdo, from October 7, 1986, until the present; for all legal purposes I have not given my consent to, nor signed, any document that could infringe upon the agreement reached with Messrs. Raisaac G. Colon Rios and Jorge G. Blanco Galdo.
>
> 8. For the purposes of the law, and in full knowledge of the penalties for perjury I hereby declare that the only document that I signed was the one that I did in conjunction with Messrs. Raisaac G. Colon Rios and Jorge G. Blanco Galdo, by marking an X in view of the fact that I am not able to read or write.
>
> 9. I have not signed any documents with any other person and I understand that the document submitted to the Federal Communications Commission is a false document dated December 27, 1986.
>
> 10. The only other person that I met with after Mr. Raisaac G. Colon Rios, was Reverend Hector Negroni Cartagena, who asked me how could I, as a Christian, allow the installation of a commercial transmitter when I could have done so for a Christian transmitter.
>
> 11. I have not signed any documents, in the past or in the present with Mr. Hector Negroni Cartagena, or any other person, and I hereby reiterate the agreement entered into with Messrs. Raisaac G. Colon Rios and Jorge G. Blanco Galdo, on October 7, 1986.
>
> For the purposes of the law, the deponent, Domingo Cruz Marin, also known as Domingo Rodriguez Marin, would like to state that Domingo Cruz Marin and Domingo Rodriguez Marin are one and the same person.
>
> The facts depicted in this Sworn Deposition are true to the best of my knowledge, and are based on information that I understand to be true and accurate.
>
> I am fully aware and understand the legal implications and penalties of this Deposition should any information contained herein be false, a fact explained to me by the authorizing Notary.
>
> [*Signature*] [*Fingerprints*] [*Cross Mark*]
> (Witness) Domingo Cruz Marin
> Rael Santana Tapia
> (Neighbor, [Social Security Number . . .])

AFFIDAVIT NUMBER: 10 167

BE IT KNOWN, that on the *15th* day of *September*, 1989 before me a Notary Public in and for the *City of Fajardo, Puerto Rico* duly commissioned and sworn, personally came and appeared *Mr. Domingo Cruz Marin.*

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my seal of office, the day and year above written.

[*Signature*]
Notary Public

Stamp Reads:

CLARA ROBLES CALDERON

Attorney-At-Law

(Blanco Ex. 5; Blanco Ex. 11, pp. 13-14 (certified translation).) A stipulation was accepted that Marin, in fact, placed his "x" mark on the document. (Tr. 146.)

86. Blanco forwarded the September 15, 1988, declaration to his communications attorneys. He did not think to send to them or to review with them the handwritten declaration from September 14. After reviewing the September 15, 1988, declaration, Blanco's communications attorneys asked if it would be possible to obtain another declaration from Marin in which he explicitly acknowledged that construction of a 150 foot tower had been contemplated. Toward that end, Blanco and Blanco Pi visited Marin in the late morning or early afternoon of October 8, 1988. At that meeting, another handwritten declaration was prepared. The document is in Blanco's handwriting. It was read to Marin in Spanish by his neighbor, Santana. (Tr. 820; Blanco Ex. 4, p. 4.) The October 8, 1988, declaration reads as follows:

I, Domingo Cruz Marin, married and residing in Aguas Claras, Ceiba, Puerto Rico, (S.S. # [. . .]) state the following:

THAT, the [sic] this statement completes my affidavit, dated September 15, 1988, submitted to Clara Robles Calderon, attorney-at-law.

THAT, I have agreed to allow Messrs. Raisaac Colon and Jorge Blanco to install 150 foot-high (one hundred and fifty feet) radio tower on my property, as long as the Federal Communications Commission approves their application.

I declare that the above is correct, after hearing it read in Spanish by Raul Sontano [sic], my neighbor in Aguas Claras.

For this purpose I sign using a cross and my fingerprints.

This affidavit is submitted freely and without reservations, with full knowledge of the penalties for perjury, on this day October 8, 1988.

[*Cross Mark*] [*Fingerprints*]
Domingo Cruz Marin

I, Raul Santana, with full knowledge of the penalties for perjury, state that I have correctly read in Spanish Domingo Cruz Marin's affidavit, submitted on this day October 8, 1988, at his residence in Aguas Claras, Ceiba, before Messrs. Jorge G. Blanco and Wifredo Blanco PT [sic].

[*Signature*]
Raul Santana (SS#[. . .])

Witnesses:

[*Signature*]
Jorge G. Blanco

[*Signature*]
Wifredo G. Blanco Pi

(Blanco Ex. 6; Blanco Ex. 11, pp. 17-18 (certified translation). A stipulation was accepted that this document also bears Marin's "x" mark. (Tr. 147.)

87. Having learned that Robles Calderon had included Marin's fingerprints when he put his mark on the September 15, 1988, declaration, it occurred to Blanco he should follow a similar procedure. Accordingly, he went to a drugstore and got an ink pad before he went to Marin's house on October 8. After having written Marin's declaration and having it read to Marin, he had Marin put his fingerprints on the declaration. (Tr. 821-822.) The document was read aloud to Marin by both Blanco and Santana. (Tr. 821-822.) The document bears Marin's cross mark and fingerprints on both of its pages. (Blanco Ex. 6.)

88. After meetings with Marin on both September 14, 1988, and October 8, 1988, Blanco believed Marin when Marin said he did not sign any paper for Negroni. (Tr. 903-904.) According to Blanco, when he eventually received a copy of the December 27, 1986, declaration, he did not necessarily believe that Marin was mistaken when he had stated that he had never signed a document for Negroni. Rather, Blanco was of the view that the December 27, 1986, Marin declaration used by Negroni to support his petition to enlarge issues against Blanco was a fabrication because of the certainty with which Marin said he had not signed a declaration for anyone else. (Tr. 903.) Blanco and his father went to Marin's house again on October 29, 1988. (Tr. 908.) On that occasion, Blanco attempted to show certain documents to Marin. Marin would not have any of it, however, and acted in an extremely hostile manner to Blanco and Blanco Pi. Blanco characterized Marin's behavior as acting in a "crazy manner." (Tr. 897-898.) Blanco did not return to Marin's house after October 29, 1988, because he feared for his life. (Tr. 904.)

Marin

89. Marin was born December 27, 1931. (Tr. 66.) He does not work and has not been able to work since he had a disc operation in 1950. (Tr. 69-70.) He still suffers from the side effects of the operation. He has a great deal of pain and sometimes he cannot sleep. (Tr. 70.) He also suffers from headaches and is nervous. Asked if he had any problems recalling events, he said, "I forget a lot. I forget a lot of things; I can't remember." (Tr. 70.) Marin and his wife live on her Social Security check and a

$100.00 a month pension he receives. Marin has no formal education and does not know how to read or write. (Tr. 71.)

90. Marin acknowledged that, when he met with Blanco Pi and Colon, he put his mark on the document regarding use of his property for a radio station. He also said that the other guy, *i.e.*, Colon, gave him a check for $50.00. Although Marin's testimony is somewhat unclear, it appears that thereafter Blanco Pi gave Marin $50.00 in cash and took the check back. (Tr. 76.)

91. Marin acknowledges that Blanco Pi and the man with him explained to him why they wanted his land and what use they would make of it. Specifically, Marin stated that "they talked to me about towers, but since I don't understand all that business about towers, I don't know." (Tr. 108.) The October 7, 1986, agreement which bears Marin's mark makes reference to the installation of a tower. (Blanco Ex. 11, p. 5.)

92. According to Marin, he put his mark on the agreement because Blanco Pi began to put pressure on him. (Tr. 75.) The agreement was given to Raul Santana Tapia, who had been called to Mr. Marin's house, and he explained it to Marin. (Tr. 77-78.) He believes that Raul Tapia read the document to him because he had it in his hands, but, according to Marin, he really didn't understand what he was saying. (Tr. 80-81.) However, according to Blanco Pi, he never pressured Marin into signing anything nor has he attempted to confuse, harass, or intimidate Marin. (Blanco Ex. 4, pp. 1, 2.)

93. At first, Marin denied that Negroni had come to him to ask about the use of his land by Blanco. (Tr. 114-116.) He further denied that Negroni asked him why he (Marin) would permit a secular radio station on his property. (Tr. 117.) According to Marin, Negroni told him that his land could not be used for a radio station "because it was dangerous," and that cables would go over his house. (Tr. 118, 169-170.)

94. Marin identified the cross mark on the December 27, 1986, declaration as the one that he made. He did not remember giving this declaration to Negroni when he was visited by Blanco in 1988. According to Marin, he was preoccupied with his wife's health and did not remember what occurred two years earlier. (Tr. 124-125.)

95. After December 1986, Marin did not recall the next time Negroni visited him. (Tr. 136.) But he did say Negroni started coming to his house to pray with him about two months prior to the hearing. (Tr. 137.)

96. Marin acknowledged that he told Blanco and Blanco Pi in September of 1988 that he had not signed a paper for Negroni, and that during that meeting, Blanco prepared a document upon which Marin placed his mark and his wife signed. (Tr. 137, 139-140.) Blanco did not force him to put his mark on the September 1988 statement. (Tr. 127.)

97. Negroni paid for Marin's transportation to the hearing and a fee for appearing as a witness. Marin also acknowledged that Negroni bought him the suit he wore to the hearing. (Tr. 163-164.)

Abuse of Process Issue Against Negroni Regarding the Ruiz Site

98. On or about Friday, December 12, 1986, at approximately 3:00 m., Hector Negroni Cartagena visited the home of Nestor Hernandez Melendez, the owner of the site proposed by Reyes Ruiz Rivera. (Negroni Ex. 3, p. 1.) He was accompanied by his secretary, Ms. Ada Luz Matias. Mr. Hernandez was alone in the house. Negroni introduced himself, and asked Hernandez if he was the owner of the property upon which his house was located. Hernandez stated that he owned approximately 900 meters of this property. (Tr. 392; Negroni Ex. 3, p. 1.) Negroni then asked him if he had given Ruiz permission to locate his proposed tower and transmitter on Hernandez' property. (Tr. 381, 391-392; Negroni Ex. 3, p. 1.) Hernandez stated that he had initially informed Ruiz that he would not lease his property because he was planning to build a second house on the property, near his existing house. (Tr. 393; Negroni Ex. 3, p. 1.) According to Hernandez, Ruiz then explained that Mr. Hernandez' plans to build the second structure would not affect his plans to locate his transmitter and other equipment and meters on the property, because this equipment could be placed in the basement of Hernandez' new house. (Tr. 393-394, 1125; Negroni Ex. 3, p. 1.) Ruiz also told Hernandez that he would pay him to read the meters periodically. (Tr. 397; Negroni Ex. 3, p. 1.) On the basis of the foregoing conversation, Hernandez gave Ruiz permission to use his property. (Negroni Ex. 3, p. 1.) Hernandez informed Negroni that he had made his property available to Ruiz, and that he had, in fact, given Ruiz permission to use his land. (Tr. 1258-1259.)

99. According to Negroni, he asked Hernandez where Ruiz was planning to place his tower, in light of Hernandez' plan to build a second house. (Negroni Ex. 3, p. 1.) Hernandnez' land is on top of a hill with a steep drop-off to the east, and it appeared to Negroni that it would be impossible to easily locate a tower at that location, especially if a second house was going to be built on the land. (*Id.*, p. 2.) According to Negroni, Hernandez' response was that he was not aware that a tower would have to be placed on his property. (*Id.*)

100. According to Negroni, he then showed Hernandez a copy of the engineering section of Ruiz' application, which proposes a 116 foot tower. (*Id.*) Hernandez also stated, according to Negroni, that Ruiz never told him that a tower would have to be placed on his property. (Negroni Ex. 3, p. 2.) Reverend Negroni asked Mr. Hernandez if he would agree to sign a declaration reducing their conversation to writing. Hernandez agreed to review and sign such a declaration. Negroni informed Hernandez that he would have a declaration prepared for Mr. Hernandez to approve and sign.

101. Following this discussion, Negroni conveyed the information he had learned to his attorney, who then prepared the following declaration (Tr. 1273):

> I, Nestor Hernandez Melendez, do hereby state as follows:
>
> 1. My wife and I are owners of land located at a site west of Route 978, at the location shown on the attached map.
>
> 2. It is my understanding that an applicant before the Federal Communications Commission, Reyes Ruiz Rivera, designated my land as the proposed location for the transmitter of a new proposed FM transmitter. Reyes Ruiz Rivera visited me in October 1986, and discussed the possibility of using my land. As I explained at that time, I own a piece of land that is approximately one-half acre in size, and the land is located on the side of a fairly steep hill. I

also informed Reyes Ruiz Rivera that I intended to build a home on that land. He replied that those plans would not prevent him from locating his transmitter on my land. He explained that he needed someplace to put the transmitter and other equipment and meters. He suggested that he could place that equipment in the house's basement, and that he could also pay me to read the meters periodically. I told him that I thought that would be fine.

3. I have now learned that Reyes Ruiz Rivera has proposed also to build a tower 116 feet (35 meters) above ground level. We had never discussed whether I would allow construction of a tower on my property. In light of the plans I have for my property, I would not permit the construction of a tower of any height on my land.

(Negroni Ex. 3, Attachment A, p. 1.)

102. Hernandez has a different recollection of the meeting with Negroni. According to Hernandez, Negroni told him that a tower of about 500 feet would be installed on his property, and that there would be many guy wires (very heavy cables) crossing the road and over his house. Also, according to Hernandez, Negroni claimed that a tower would cause interference to his television set, and that Hernandez would not be able to see programs on it. Negroni further inquired whether Roosevelt Roads Naval Station had been contacted and indicated that the base would have problems if the tower were on the Hernandez property. (Tr. 378, 382, 1074; Ruiz Ex. 2A, p. 1.)

103. Ruiz acknowledged the possibility of discussing with Hernandez that the meters for the transmitter could be placed in the second house's basement. (Tr. 1125.) Also, while Hernandez did not recall being shown the engineering portion of Ruiz' application by Negroni, he acknowledged that Negroni had a "very large map" with him during their first meeting. (Tr. 384.) Mr. Hernandez concedes that as of the date Negroni first visited him, he had not yet discussed with Ruiz how tall the tower would be, and that Negroni never suggested to Hernandez that he not permit Ruiz to use his land as the location for a transmitter site. (Tr. 382-383.) At no time did Negroni ever indicate or suggest to Hernandez that he should revoke any permission that Hernandez had given to Ruiz to use his land. (Tr. 383.) According to Negroni, Hernandez admitted not being familiar with FM towers and asked if Negroni could describe these towers to him. (Negroni Ex. 3, p. 2.) In response to Hernandez' inquiry, Negroni recalls explaining that there are two types of FM towers, self-supported and guyed (*Id.*) and thinks that it is "possible" that another applicant's 600-foot proposal was mentioned. (Tr. 1260-1261.) He told Mr. Hernandez that guyed towers are secured in place with cables as opposed to self-supporting towers which are bolted in place and stand alone without cables. (Tr. 1256-1258; Negroni Ex. 3, p. 2.) However, according to Negroni, during the course of the conversation, he stated to Hernandez that Ruiz was proposing a self-supported tower. Negroni stated that it was Hernandez who asked if towers could cause interference to his television reception to which Negroni responded that it depended largely upon how the tower was constructed. (Tr. 1261-1263; *Id.*)

104. After receiving the declaration prepared by his attorney, Negroni and Matias again visited Hernandez' home on December 26, 1986. Negroni had only an English-language version of the declaration with him. According to Negroni, Hernandez asked him to come back the next day because Hernandez wanted to discuss the declaration with his wife. (Negroni Ex. 3, 3.)

105. Negroni next visited with Hernandez on December 27, 1986. After going to Hernandez' home, he found Hernandez at a store which was owned by his father-in-law. Hernandez told Negroni that he was busy at the moment and requested that Negroni return at a later time. According to Negroni, they agreed to meet on Sunday, December 28, 1986, at around 10:30 a.m. (Tr. 1167; Negroni Ex. 3, p. 4.)

106. Negroni attempted to see Hernandez on several other occasions in order to have him sign the declaration. Negroni was not successful. Finally, according to Negroni, he and Matias returned to Hernandez' home with the declaration on December 31, 1986. According to Negroni, Hernandez informed him that he (Hernandez) had talked with Ruiz, and they had come to a further agreement regarding the use of the property. Hernandez did not sign the declaration. (Negroni Ex. 3, p. 5.)

107. According to Negroni, his intent in visiting Hernandez was not in any way to attempt to convince him to retract the permission given to Ruiz. (Negroni Ex. 3, p. 6.) Rather, he visited Hernandez to learn the status of the negotiations he had engaged in with Ruiz. (*Id.*, p. 7.) Negroni's version of the facts were, for the most part, corroborated by his secretary, Ms. Matias. (Negroni Ex. 5, pp. 6-10.)

Archilla Site Misrepresentation Issue

108. The site presently specified as Archilla's transmitter site is owned by Reverend Enrique Amaro. On August 20, 1987, Archilla went with Jose Martinez,[17] an engineer, to the home of Reverend Enrique Amaro in Cerro Corozal, Ceiba, Puerto Rico. (Archilla Ex. 5, pp. 2, 4.) Martinez introduced Archilla to Reverend Amaro as an applicant for a new FM station in Naguabo. According to Archilla, he requested permission to use Amaro's property for the proposed station. (Tr. 1546; Archilla Ex. 5, p. 3.) Martinez asked Amaro whether he would have any reservations about Archilla using his land for the proposed station. (Tr. 1030; Archilla Ex. 5, p. 2.) Reverend Amaro answered that he would ". . . get into a deal for renting the place . . ." and that other people were also interested. (NBC Ex. 6, p. 7.) Amaro recalled Archilla asking to rent the land in order to install a tower. (NBC Ex. 6, 32.)[18]

109. According to Archilla, on this first visit to Reverend Amaro's site, he and Martinez spent 20 to 30 minutes discussing the use of the property with Amaro. (Tr. 1028.) They discussed an existing tower on Amaro's property and how much rent Amaro was receiving for it; the possibility of using an existing water tower on the property; the tower height necessary to transmit from the property; and whether Amaro preferred to lease or sell the property. (Tr. 1029-1033, 1546-1547, 1607-1608.) Amaro, Archilla and Martinez then shook hands, Archilla gave Amaro his business card, and when Archilla and Martinez left, Archilla believed he had found a suitable transmitter site. (Tr. 1021, 1031, 1548.) According to Archilla, Amaro did not want to sell any portion of his property, but, rather, preferred to lease a small plot of his land. (Tr. 1547.)

Archilla believed that Amaro agreed to make the land available to him, and that they would reach an agreement regarding the rent after the construction permit was awarded. (Tr. 1607.)

110. Archilla also stated that Amaro indicated he wanted the existing communications tower removed because he was being paid only $25.00 per month. Apparently, Amaro had given permission for the installation of only one antenna on the tower, but other antennas had been added over time. (Tr. 1547, 1607.) Archilla told Amaro the amount of rent he intended to pay would be much more than $25.00 per month, but Amaro did not want to go into the terms of the lease. (Tr. 1608.) Archilla did not ask Amaro to sign a lease at the August 20, 1987 visit, and they did not reach a specific agreement regarding price or the amount of land to be rented. (Tr. 1625; NBC Ex. 6, p. 33.) Martinez accompanied Archilla because he had been asked for assistance in seeking a site for Archilla's proposed Naguabo FM station. He stated that he and Archilla drove through the area considering various sites and spoke with many people. (Archilla Ex. 5, p. 4.) Martinez stated that when Archilla identified himself to Amaro as an applicant for the proposed FM station, Amaro indicated several persons had visited him and discussed the possibility of building a radio station on his property. (Tr. 1020-1021; Archilla Ex. 5, p. 4.)

111. A year later, in August 1988, Resto visited Amaro to find out whether he had given Archilla permission to use his land. (NBC Ex. 3, p. 1.) On August 30, 1988, Amaro entered into a handwritten lease for the land with Blanco.[19] (Tr. 1642-1643.) On September 4, Resto returned to Amaro's residence with a declaration stating that Amaro had not given permission for use of the land to anyone but Resto, and Amaro signed it. (NBC Ex. 3, p. 5.)

112. The declaration stated as follows:

> I, Don Enrique Amaro, resident of Ceiba, Puerto Rico, hereby certify that I did not discuss the use of my property with Efrain Archilla Diez or give permission to Efrain Archilla Diez or to any other person, except Francisco Resto Torres, to use my property as a transmitter site for a radio station. The only person I have agreed to make my property available to is Francisco Resto Torres.
>
> (NBC Ex. 3, p. 5.)

The foregoing declaration was filed by Resto in support of a petition to enlarge issues against Archilla.

113. On September 20, 1988, Archilla visited Amaro and asked Amaro if he remembered him from his visit the previous year. (Archilla Ex. 5, 2.) Amaro remembered that Archilla was from WALO, and that he had visited him quite a while before. (NBC Ex. 6, pp. 28, 32.) Archilla, who was accompanied by Oswald Pinott,[20] then showed Amaro his September 4, 1988, declaration filed with the Commission by Resto.[21] (Archilla Ex. 5, pp. 2, 5.) Archilla explained that he needed something on paper saying that Amaro's site would be available to Archilla if Archilla obtained the construction permit for Naguabo, but Archilla did not come with a prepared declaration for Amaro to sign. (Tr. 647, 1613; Archilla Ex. 5, p. 3.) Amaro declined to sign any statement and said he was referring all those interested in the site to his son Samuel Amaro. (Archilla Ex. 5, p. 2.)

114. That evening, Archilla telephoned Samuel Amaro, and they agreed to meet on October 1. (Archilla Ex. 5, p. 3.) On October 1, Archilla and Pinott met with Reverend Amaro and his sons. (Archilla Ex. 5, pp. 3, 5.) Samuel Amaro agreed to set up an appointment with his father's attorney, Bernardo Colon Barbosa, in order to execute an agreement making the land available to Archilla if he obtained the construction permit. (Archilla Ex. 5, p. 3.) At that meeting, Reverend Amaro told Colon Barbosa that he had reached an agreement regarding his property with Archilla in August 1987. (NBC Ex. 6, p. 16.)

115. On October 19, Resto visited Amaro, taking with him Amaro's September 4 declaration and a copy of Archilla's declaration concerning his visits with Amaro. (NBC Ex. 3, p. 2.) Resto returned on October 23 with another declaration, prepared for Amaro's signature, stating that the September 4 declaration was true. (NBC Ex. 3, pp. 2, 8.)

116. Reverend Amaro later testified at his deposition that he signed papers for people because he was told that he ". . . could sign ten papers if [he] wanted; that in the last instance this would be decided out there in the U.S. when they finally granted the permission to only one person." (NBC Ex. 6, p. 7.) According to Amaro, Resto has shown him " . . . more than a few papers," and that Resto ". . . made his explanations, but he did not read them to [Amaro]." (NBC Ex. 6, p. 18.) When asked whether he remembers anything Resto said when Resto brought the declarations for him to sign, Amaro said, "No, I don't remember . . They just bring these documents to me, I sign them for them, and then they just leave. We don't talk a lot." (NBC Ex. 6, p. 29.) Amaro did not prepare "his" declarations for Resto; Resto, or his lawyer, prepared them and brought them to Amaro. (*Id.*) Resto even filled in the date. (*Id.*, at 29-30.)

117. Amaro had given Archilla permission to use his property as a transmitter site ". . . a long time before . . ." he signed the September 4 declaration. (NBC Ex. 6, p. 7.) At the time of his deposition, he had given permission to Archilla, Resto and Blanco (NBC Ex. 6, p. 20) and had not told Resto that he had exclusive permission to use the land. (NBC Ex. 6, p. 9.)

118. According to Reverend Amaro, until the Commission awards the construction permit, he would not know how much he would ask for the property. (NBC Ex. 6, p. 9.) Nevertheless, following the October 1, 1988, meeting, a lease contract between Archilla and Reverend Amaro was prepared by Amaro's attorney, Bernard Colon Barbosa. (Tr. 1619-1621.) Specifically, on November 30, 1988, Amaro and Archilla entered into a lease agreement wherein Amaro agreed to allow Archilla to use his property as a transmitter site if Archilla obtains the construction permit at issue in this proceeding. (Tr. 1619-1621.) This lease was identical to the one between Blanco and Amaro. (Tr. 1623.) Archilla paid Reverend Amaro $200.00, and he paid Barbosa for preparation of the agreement. (Tr. 1624-1625.)

ULTIMATE FINDINGS AND CONCLUSIONS

119. This proceeding involves five mutually exclusive applications for a new FM station in Naguabo, Puerto Rico. In addition to the comparative issue, several basic qualifying issues have been specified against some of the applicants. Because only basically qualified applicants are entitled to comparative consideration,[22] the basic issues will first be considered and resolved before a comparative evaluation is undertaken.

Section 73.207 Issue

120. Section 73.207 of the Commission's rules requires commercial FM broadcast stations to be separated, according to their respective classes, by certain minimum distances. In this case, the required minimum distance between the Channel 225A allotment at Naguabo and WTPM(FM), San Juan, is 163 kilometers. NBC, Blanco, Archilla, and Ruiz propose transmitter sites that are short-spaced to WTPM(FM). Specifically, NBC, Blanco (from the site proposed in its pending amendment),[23] and Archilla are short-spaced by 3.0 kilometers; Ruiz is short-spaced by 3.4 kilometers. Because of the short-spacing, an issue was specified to determine whether waiver of Section 73.207 was warranted.

121. It is well established that when an applicant requests a waiver of the Commission's minimum spacing requirements, he must make a threshold showing that suitable non short-spaced sites are unavailable. *Carroll - Harrison Broadcasting, Inc.*, 39 RR 2d 279 (1976). The applicant must also demonstrate that the proposed site is the least short-spaced of those short-spaced sites that are available. *Megamedia*, 42 RR 2d 208 (1978); *Townsend Broadcasting Corporation*, 62 FCC 2d 511 (1976). Finally, because the Commission's spacing requirements presumptively serve the public interest, applicants requesting waivers to operate from short-spaced sites must show that the public interest will be better served by a waiver in the circumstances presented. *Caloosa Television Corporation*, 3 FCC Rcd 3656 (1988).

122. NBC, Blanco, Archilla and Ruiz clearly have satisfied the threshold showing. The Findings show that the only sites that are fully spaced to WTPM(FM) are located either on property belonging to the U.S. Naval Station at Roosevelt Roads, Puerto Rico, and are not available, or are situated in areas from which service to Naguabo would be obstructed by intervening terrain. Accordingly, it is concluded that there are no suitable, fully-spaced sites available. In this connection, it is significant to note that the *HDO* specified short-spacing and city coverage issues because there exists "an inextricable link in this proceeding between [each] applicant's location and its ability to satisfy the Commission's policy of requiring a minimum signal strength of 70 dBu over 80 percent of the community of license." *HDO*, 3 FCC Rcd at 4634. Because of this "inextricable link," the *HDO* acknowledged that, by necessity, "the short-spaced applicants sacrifice spacing for coverage; the fully spaced applicants, coverage for spacing." (Footnote omitted.) *HDO*, *supra*.

123. The Findings establish that NBC, Blanco, and Archilla have selected a common transmitter site that is the least short spaced of the short-spaced sites that are available. In this connection, it cannot be sufficiently emphasized that the *HDO* made reference to the difficulties in locating a site which satisfies the Commission's rules. Here, the uncontroverted testimony of Robert Purcell, consulting engineer for Archilla, establishes that the common site selected by NBC, Blanco, and Archilla is the least short-spaced site available. While Negroni takes issue with this and argues that a sufficient showing in this regard has not been made, it is significant to note that Negroni has not identified another suitable site which is less short spaced. In the absence of credible evidence to the contrary, the Presiding Judge will rely on the uncontradicted testimony of an expert witness and conclude that the site selected by NBC, Blanco, and Archilla is the least short-spaced site available from which a 70 dBu signal can be provided to Naguabo.[24]

124. Finally, the public interest will be served by granting a waiver of the Commission's short-spacing rule insofar as NBC, Blanco, and Archilla are concerned. Such waiver will permit the establishment of a first local outlet for Naguabo. Having regard for the nature of the terrain and the lack of a fully-spaced site from which a city-grade signal would be delivered to Naguabo, the only way such a local station could be authorized for Naguabo is to waive Section 73.207 of the Commission's rules.[25] Under these circumstances, the public interest would be served by waiving Section 73.207 as to NBC, Blanco, and Archilla. *Radio Station WKDO*, 37 RR 2d 1485 (1976).

125. Ruiz is not entitled to a waiver simply because he has not specified the least short-spaced suitable site available. The Commission has oft stated the requirement that applicants, in order to warrant a waiver of Section 73.207 must show, *inter alia*, that there are no less short-spaced sites available. *Tri - Valley Broadcasting Company*, 4 FCC Rcd 4711 (1989); *Megamedia*, 67 FCC 2d 1527 (1978), 42 RR 2d 208 (1978); *Townsend Broadcasting Corporation*, 62 FCC 2d 511 (1976). Here, clearly, there is at least one other less short-spaced site available which Ruiz ignored although he knew such a site was available because other applicants had specified it. Rather, Ruiz made no effort to secure that site. Some of the parties argue that the difference between the short spacing of NBC, Blanco, and Archilla on the one hand (3.0 km) and Ruiz on the other hand (3.4 km), is not large and therefore Ruiz should also be granted a short-spacing waiver. But such result would totally ignore the Commission's requirement for waiver that an applicant must show it has selected the least suitable short-spaced site. Ruiz has clearly not done that, and to grant a waiver under these circumstances would render nugatory the Commission's requirement of selecting the least short-spaced site. Because Ruiz has clearly failed to comply with Commission requirements warranting a waiver of Section 73.207, his request for waiver will be denied.

Negroni - Section 73.315

126. Section 73.315(a) of the Commission's rules requires an applicant to provide a signal strength of 70 dBu over the entire principal community to be served. However, an applicant will be found to be in substantial compliance with Section 73.315(a) if he provides a minimum signal strength of 70 dBu to at least 80 percent of the community. *See, HDO*, paragraph 4, which cites *Letter to Southwest Communications, Inc.*, Ref. 8920-HVT (Acting Chief, FM Branch, July 16, 1986). Section 73.315(b) states that a transmitter location should provide line-of-sight service from the antenna over the city to be served; however, in no event should there be a major obstruction in this path.

127. While NBC, Blanco, Archilla, and Ruiz have proposed transmitter sites at locations that sacrifice spacing for coverage, Negroni has selected a site that sacrifices coverage for spacing.[26] In this regard, the Findings establish that from the Negroni site no portion (0 percent) of the community of Naguabo would receive a signal of 70 dBu intensity because of intervening terrain. Indeed, Ruiz' consulting engineer, relying upon Tech Note 101, calculated that the strongest signal Negroni would provide to Naguabo would be 49.9 dBu. Thus, it is clear that Negroni's proposal, absent the use of an auxiliary facility, does not even begin to approach the 80 percent compliance standard and, therefore, fails entirely to satisfy the minimum requirements of Section 73.315. To cure this significant city-coverage deficiency, Negroni proposes to utilize an FM translator station.

128. The difficulty with Negroni's proposal is that it is totally speculative with no assurance that it could be implemented. Specifically, there is no assurance that Negroni will ever be able to receive an authorization for an FM translator. Negroni has no application for such a translator on file at this time, and presently the Commission has imposed a "freeze" on the filing of such applications. Moreover, even if an application is later filed, it will be subject to the filing of competing applications. Furthermore, an FM translator is a secondary service subject to displacement by establishment of a new primary station or the relocation of an existing primary station. There is, thus, no reasonable basis for concluding that Negroni's coverage shortcomings can be remedied by a translator.

129. The cases relied upon by Negroni are not persuasive. *WSTE-TV, Inc.*, 75 FCC 2d 52 (1979); *recon. denied*, 79 FCC 2d 349 (1980), did not involve mutually exclusive applications. Here, Negroni faces four competitors, each of whom would place a city-grade signal into Naguabo. Second, the applicant in *WSTE-TV* demonstrated the unavailability of a transmitter site from which it could place the appropriate city-grade signal into the community of license. Here, it is clear that a suitable transmitter site from which an applicant could place a city-grade signal into Naguabo is available (*i.e.*, the Amaro site). Third, in *WSTE-TV*, the translator application was actually before the Commission. Here, Negroni has not filed such an application and indeed cannot presently file such an application.

130. Finally, the Commission in *WSTE-TV, Inc.*, authorized a translator station to "augment" the partial city-grade service provided by the primary station. Here, however, Negroni proposes to use a translator station to accomplish the entire task of providing a 70 dBu signal to the community of license, and, while Negroni would provide Naguabo with a first local FM service, the other applicants in this proceeding seek to do the same. Thus, Negroni's proposal lacks the compelling public interest factors which the Commission found decisive in *WSTE-TV*.

131. The Commission emphasized in *WSTE-TV*, that "waiver requests are not used as devices to bootstrap clearly deficient proposals," and that approval of the *WSTE-TV* plan to rely upon a translator "should not be regarded as any lessening of our commitment to insuring adequate principal community coverage from the main transmitters of . . . stations . . ." *WSTE-TV, Inc.*, 75 FCC 2d 57, 64 (1979). Negroni's translator proposal is nothing more than an attempt to bootstrap a clearly deficient technical proposal. In light of the fact that other applicants comply with the Commission's coverage requirements, waivers of Sections 73.315(a) and (b) to accommodate Negroni's proposal are not justified. Negroni has simply failed to provide compelling public interest factors which would warrant waiver of Sections 73.315(a) and (b) of the Commission's rules. Accordingly, Negroni's application must be denied for failure to comply with Sections 73.315(a) and (b) of the rules.[27]

Blanco - Section 73.315(a) Issue

132. The Section 73.315(a) issue was specified because of coverage deficiencies from Blanco's originally specified site. However, Blanco has since filed an amendment to his application to specify the Amaro site, which amendment will be accepted. From Blanco's new site, all of Naguabo would receive a 70 dBu or greater signal. First, Naguabo is well within the predicted 70 dBu contour. (Blanco Ex. 14.) Furthermore, a Tech Note 101 study performed by Blanco's consulting engineer confirms that, notwithstanding a minor break in the line-of-site, all of Naguabo would receive a signal greater than 70 dBu. (*See*, paragraph 64.) Accordingly, the Section 73.315(a) issue is resolved in Blanco's favor.

Issues Against Negroni and Blanco -

Regarding Blanco's Originally Specified Site (The Marin Site)

133. These issues were specified based on charges and counter charges leveled by Negroni and Blanco. The questions raised, *inter alia*, were whether Blanco secured reasonable assurance before he specified the Marin site; whether Negroni used a document which did not contain a genuine signature to support a petition to enlarge issues; and whether such conduct represented an abuse of process.

134. It is clear from the Findings that Marin is not a credible witness and his testimony cannot be relied upon to support adverse findings and conclusions against either Negroni or Blanco. This is evident from the fact that Marin, who cannot read or write, has given both Negroni and Blanco several statements which are totally inconsistent on the relevant and important matters in dispute. It is the failure of Marin to testify in a consistent and clear manner and his numerous prior inconsistent and conflicting statements which destroy his credibility as a witness.

135. With specific reference to Blanco, it appears that reasonable assurance of site availability was secured from Marin prior to the filing of Blanco's application. The clear and credible testimony of Blanco Pi establishes that he and Blanco's prospective partner, Raisaac Colon Rios, met with the site owner, Marin, well before the application was filed; they explained to Marin the nature of the project, including the fact that the tower would be approximately 150 feet high in order to clear the mountain that can be seen from the property; Blanco Pi and Colon prepared a handwritten agreement which set forth the terms of their arrangement; the agreement was prepared in Marin's presence and read to him by his neighbor; Marin placed his "mark" on the document and was paid $50 for entering into the agreement.

136. These facts clearly provided Blanco with the necessary reasonable assurance of site availability as that term has been defined in Commission cases. *William F. Wal-*

lace, et. al., 49 FCC 2d 1424 (1974); *Dutchess Communications Corp.*, 101 FCC 2d 243 (1985); *Elijah Broadcasting Corp.*, 3 FCC Rcd 5148 (1988). There was no misrepresentation on the part of Blanco in specifying the Marin site.

137. Originally, Marin stated that he did not know a tower of 153 feet would be erected by Blanco, and he would not permit a tower of this height on his property. But this statement was contradicted by Marin in a second statement wherein he acknowledged that, "the tower's installation was explained to me as well as its height and its construction." There is no credible evidence that the height was not discussed with Marin, and his conflicting and contradictory statements cannot serve as a basis to support such a finding. Indeed, Marin's testimony, as previously noted, is unreliable and untrustworthy and actually worthless in predicating findings and conclusions. Because Blanco was not at fault in originally specifying Marin's site, its present unavailability (due to factors beyond Blanco's control) provides good cause to permit Blanco to specify a new site (the Amaro site). Therefore, his pending petition for leave to amend will be granted, and his amendment specifying the Amaro site will be accepted.

138. The issue against Negroni was specified because he submitted a document to the Commission bearing the signature of Marin when, in fact, Marin could not read or write. Nowhere was it indicated that Marin could not read or write or that he did not affix the Marin signature to the document.

139. Negroni can be faulted for not revealing that the Marin declaration, used to support a petition to enlarge issues, did not contain Marin's genuine signature and that Marin could not read or write. Nevertheless, it appears that the cursive Marin signature was affixed at the direction of Marin after the declaration had been read to him. Thus, under these circumstances, there was no forgery.

140. Nor does it appear that Negroni was guilty of misrepresentation, lack of candor, or an abuse of the Commission's processes in this matter. Clearly, Negroni was entitled to investigate the availability of the sites specified by other applicants in this proceeding, and his investigation of Blanco's site did not exceed proper bounds. (*See, Chronicle Broadcasting Co.*, 40 FCC 2d 775 (1973). However, Negroni's problems resulted from the fact that he unfortunately relied on Marin, a totally unreliable witness. In this respect, both Negroni and Blanco were victimized by Marin's inability or unwillingness to furnish accurate, truthful information. Marin gave both Negroni and Blanco different and conflicting information. As a result, both applicants, relying on Marin's declarations, were saddled with basic issues. But, the Findings do not justify the disqualification of either applicant. Thus, all issues specified against Blanco and Negroni stemming from Blanco's specification of the Marin site will be resolved in favor of the applicants.

Issues Relating to Negroni Concerning Ruiz' Transmitter Site

141. Issues were designated to determine whether Negroni attempted to deprive Ruiz of his specified transmitter site and whether such conduct abused the Commission's processes.

142. It is undisputed that Negroni investigated whether Ruiz had secured permission from Hernandez to use his land for a transmitter site. The principal dispute is the nature of the conversation Negroni had with Hernandez, and whether Negroni's contact and conversation with Hernandez was designed to deprive Ruiz of his transmitter site.

143. Hernandez alleged that he was told by Negroni that a tower of 500 feet would be installed on his property; that there would be many guy wires crossing the road and over his house; that a tower would interfere with reception on his television set so as to preclude him from seeing programs on it; and that problems might result from the nearby naval base. Negroni admits that some of the matters alleged by Hernandez were discussed during their conversation. But the discussion, for the most part, related to Negroni answering questions raised by Hernandez and attempting to explain to Hernandez the different types of FM towers. In this connection, Negroni showed Hernandez the Ruiz application which proposed a 116 foot self-supported tower. He also explained to Hernandez the differences between a self-supported and guyed tower. The discussion described by Negroni resulted from his curiosity as to where the Ruiz tower would be placed because Hernandez only had a small piece of land and he was going to build a second house on the property. The discussion was not designed to deprive Ruiz of his site, but, rather, to inform and educate Hernandez who was ignorant on the subject of FM towers.

144. The Presiding Judge is inclined to believe Negroni's version of the facts. First, his account was corroborated by Ms. Matias, who, despite the arguments of some of the other applicants, appeared to be a credible witness. Moreover, Hernandez did not appear to be a sophisticated individual, and it is quite likely he misinterpreted the comments made by Negroni during their conversation. Also, the statement Negroni prepared for Hernandez' signature appears accurate in most respects and only questions Ruiz' permission to build a tower on the property.[28] Most important, Hernandez himself acknowledged that Negroni never suggested that he should revoke any permission he had given Ruiz to use his land. The cases cited by some of the other applicants are inapposite. For example, Negroni's actions clearly differ from those of the applicants in *WIOO, Inc.*, 34 RR 2d 1093 (Rev. Bd. 1975), *rev. denied*, FCC 76-892 (September 28, 1976), and *Bendel Broadcasting Corp.*, 55 RR 2d 1625 (1984), whose actions were found to have no other purpose than to obstruct a competitor's prosecution of its application. Similarly, Negroni's actions in no way resembled those in *Chronicle Broadcasting, Co.*, cited *supra*, where a hired investigator sought information regarding the personal, social life, past marital history, and drug use of an adversary. Clearly, Negroni did not attempt to harass or put social or economic pressure on either Ruiz or Hernandez. Nor did he harass an applicant or its employees or interfere in zoning processes, as was alleged in *Rocket Radio, Inc.*, 56 FCC 2d 238 (Rev. Bd. 1975). Here, Negroni's visits to Hernandez to have him sign a declaration were largely the result of Hernandez' continued requests that Negroni return to his home. Moreover, when Hernandez told Reverend Negroni that he could not sign the declaration due to the "further agreement" he had just reached with Ruiz, Negroni immediately ceased all contact with Hernandez. Negroni's actions were not unlike those in *Valley Broadcasters, Inc.*, 60 RR 2d 1671

(Rev. Bd. 1986), wherein the applicant was found to have reasonably and legitimately investigated a competitor's site and properly brought to the attention of the land owner the competitor's proposal. Under these circumstances, the Presiding Judge will resolve these issues in favor of Negroni. Specifically, Negroni did not impermissibly attempt to deprive Ruiz of this transmitter site and did not abuse the Commission's processes in conducting his investigation of the availability of Ruiz' site.

Initial Site Availability/Misrepresentation Issue re: Archilla

145. Originally, an issue was specified against Archilla to determine whether he presently has reasonable assurance of the availability of his site, and whether he had such reasonable assurance at the time he amended his application on November 9, 1987. The aspect of the issue dealing with present reasonable assurance was resolved in favor of Archilla by Summary Decision. (*See,* Footnote 5.) The issue that remains is whether Archilla had reasonable assurance of site availability when he amended his application on November 9, 1987, to specify his current site.

146. The site issue against Archilla was specified on the basis of a declaration by Amaro, the site owner, that stated, *inter alia*, that . . ."he did not discuss the use of my property with . . . Archilla . . ."; that "the only person I have agreed to make my property available to is Francisco Resto Torres." This declaration was signed by Amaro on September 4, 1988, and is incorrect in several significant respects. First, it is absolutely clear from the Findings that Amaro did, in fact, discuss the use of his property with Archilla in the company of Martinez. (*See,* paragraphs 108-109.) Also, some five days before signing the declaration stating that the only person he had agreed to make his property available to was Francisco Resto Torres, Amaro had entered into a handwritten lease of his property with Blanco. Obviously, Amaro, an elderly man, has a faulty recollection. Indeed, it now appears that the specification of the site issue against Archilla was predicated on erroneous statements in Amaro's declaration.

147. Notwithstanding the arguments of the other applicants, Archilla secured reasonable assurance of the availability of Amaro's property for a transmitter site before he specified that site in the November 9, 1987, amendment to his application. While the other applicants rely on some of Amaro's deposition testimony (specifically NBC Ex. 6, p. 30), that testimony is inconsistent with the remainder of the deposition testimony. Taken as a whole, Amaro's deposition testimony establishes that he had given permission to Archilla to specify his land as a site. Clearly, Archilla visited Amaro, discussed the use of his land, secured from him reasonable assurance of its availability, with the rental price to be negotiated at a later time. This provided Archilla with the necessary reasonable assurance of the site's availability, and the arguments to the contrary by the other applicants are rejected. *Elijah Broadcasting Corporation*, cited *supra*.

148. The cases cited by the competing applicants involving site availability issues are distinguishable. In most of the cases, the site owner denied that the applicant had reasonable assurance of the site. *See, e.g., Alden Communications Corp.*, 102 FCC 2d 518 (Rev. Bd. 1985) (applicant specified government land for its transmitter site, but never applied for a lease, and government agency insisted that it had not given anyone any assurances as to the availability of the site); *Shoblom Broadcasting, Inc.*, 95 FCC 2d 444 (Rev. Bd. 1983) (applicant notified by the government that the land could not be used for broadcast transmission, yet did not inform the Commission of this rejection of its site, and continued to insist that the land was available for its use); *Webster-Fuller Communications Associates*, 3 FCC Rcd 6967 (Rev. Bd. 1988) (landowner testified that his land was not available for use as a transmitter site and that he never gave applicant permission to specify the land); *Cuban-American, Ltd.*, 2 FCC Rcd 3264 (Rev. Bd. 1987) (two applicants specified a site even though the site owner said it was not presently willing to consider any proposals to mount additional antennas on its tower); *Dutchess Communications Corp.*, 101 FCC 2d 243 (Rev. Bd. 1985) (applicant was informed by the site owner three years prior to the hearing that the proposed site was no longer available, yet the applicant did not amend to change site); *Houston Family Television, Ltd.*, 101 FCC 2d 661 (Rev. Bd. 1985) (applicant received affidavit from the owner of proposed site in which the owner refused to allow the applicant to use the site, yet the applicant did not specify a new site until eight months later).

149. The Findings reflect that when Archilla and Martinez left Amaro's property in August 1987, there was a meeting of the minds that Amaro's land would be available to Archilla as a transmitter site if Archilla received the Naguabo construction permit. That this was the agreement between Archilla and Amaro is demonstrated by the fact that Amaro later confirmed this understanding, and a written lease between Amaro and Archilla for the property was subsequently negotiated and executed. Amaro has also entered into a written lease with Blanco. Resto (NBC) also proposes Amaro's site, and Amaro has stated he would make his site available to the winner determined by the FCC. (NBC Ex. 6, pp. 9, 15, 19-20.) These facts distinguish this case from those relied upon by the competing applicants. Because Archilla had reasonable assurance of his proposed transmitter site when he amended his application in 1987, the site availability/misrepresentation issue is resolved in favor of Archilla.

COMPARATIVE ISSUE

150. Of the five applicants in this proceeding, three have been found basically qualified. Ruiz and Negroni have failed to meet basic qualifying issues, and their applications must be denied. Because, as previously noted, only basically qualified applicants are entitled to comparative consideration, the Presiding Judge will comparatively evaluate the applications of NBC, Blanco, and Archilla.

151. The comparative evaluation of mutually exclusive broadcast applications is governed by the Commission's 1965 *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393. Therein, the Commission established the primary objectives toward which the process of comparison should be directed. They are (1) a maximum diffusion of control of the media of mass communications, and (2) the best practicable service. In determining which applicant will insure the best practicable service to the public, the Commission, in its *Policy Statement on Comparative Broadcast Hearings*, stated that consideration must be given to the degree of integration of ownership and management and to the attributes of the participating owners -- including such matters as broadcast experience, local residence and past participation in civic affairs. Participation in station operation by owners is considered by the Commission to be a factor of substantial importance

because, "[i]t is inherently desirable that legal responsibility and day-to-day performance be closely associated." *Policy Statement, supra*, at 395. Full time, or almost full time, participation in station operation by owners is of primary interest, particularly when coupled with local residence, broadcast experience and past participation in civic affairs. Part-time participation is of lesser importance. Indeed, it has previously been held that participation of less than 20 hours per week is not entitled to integration credit. *Midwest Broadcasting Company*, 70 FCC 2d 1489 (1979).

Diversification

152. None of the applicants have media interests cognizable under the diversification criteria.[29] Therefore, all applicants are equal on this important comparative factor, and the case must turn on the "best practicable service" aspect of the comparative issue.

Best Practicable Service - Integration

153. NBC, Blanco, and Archilla each claim 100 percent integration credit. However, Blanco argues that NBC is not entitled to 100 percent credit because "Resto's wife must be considered a 50 percent owner for whom no integration proposal was advanced." This argument is rejected. Under no reasonable interpretation of the Findings can Resto's wife be considered a 50 percent owner, and Blanco's arguments to the contrary are unsupported, speculative, and totally unpersuasive. In this connection, Blanco's reliance on *Richard P. Bott, II*, 4 FCC Rcd 4924 (1989) is misplaced. Specifically, *Bott* is distinguishable because here it is the husband, as opposed to the wife, who is proposed to be integrated and, thus, no qualitative benefit would accrue to the applicant on the basis of female ownership, which might otherwise serve as a motive for structuring an application for comparative purposes, differently from the intended operating structure. Moreover, in *Bott*, the husband was intimately involved in the preparation and prosecution of the application. There is here no showing of involvement by Resto's wife, and there would be no motive for Resto to have artificially structured his application to exclude his wife. She will work at the station in a management position and, under these circumstances, there would be no reason to exclude her from an ownership interest if that was intended. Blanco's arguments are totally without merit and in no way undermine NBC's claim to 100 percent integration credit.

154. Ruiz argues that Archilla should not receive 100 percent integration credit because of his time commitments as engineering consultant to WAMA and to his civic activities. These arguments are rejected. First, Archilla's time commitment to WAMA amounts to only a few days each year and will not in any way prevent him from implementing his integration commitment. Moreover, Archilla's civic involvement has not been shown to prevent implementation of his integration commitment, and, if those activities interfere with Archilla's commitment, they can be reduced. Ruiz has not shown that either Archilla's engineering consulting work for WAMA or his civic activities will prevent him from fulfilling his integration proposal. On the contrary, Archilla has shown that he is entitled to 100 percent integration credit.[30]

155. Because the three qualified applicants have each been found to be entitled to 100 percent integration credit, the enhancement factors relating to each will be considered. While each applicant attempts to diminish the merit of its opponents' enhancement factors, it appears that of the three remaining qualified applicants only Archilla has resided within the service area of the station (since 1973) and receives credit for significant civic involvement. Resto, NBC's only principal, has never resided within the service area although he proposes to move there. The same can be said for Blanco. Neither Resto nor Blanco have any civic involvement within the proposed service area. Thus, Archilla receives credit for long-time residence within the proposed service contour and substantial involvement in civic activities; Resto and Blanco receive no such credit.

156. Blanco, Resto, and Archilla each have past broadcast experience, but it appears that Archilla's is more extensive and involves significant managerial responsibilities. Each applicant is entitled to enhancement credit for being Hispanic. Resto (NBC) and Archilla are entitled to credit for proposing auxiliary generating equipment.

157. None of the applicants provide service to underserved areas. Indeed, a significantly greater number than five full-time aural services are available to all of the proposed coverage area of each applicant. However, NBC is entitled to a slight coverage preference over Archilla and Blanco for serving a greater population (NBC, 210,365; Archilla, 158,711; Blanco, 155,608). *Cotton Broadcasting Company*, 104 FCC 2d 473 (1986); *Christian Broadcasting of the Midlands, Inc.*, 99 FCC 2d 578 (1984).

158. To summarize, the main distinguishing factors enhancing Archilla's 100 percent integration proposal is his long-time residence within the service area and his involvement in numerous civic activities. His broadcast experience is also more solid than Blanco's or Resto's. These factors override NBC's slight preference for coverage and tip the comparative scales clearly in favor of Archilla. Grant of his application will best serve the public interest.[31]

Accordingly, IT IS ORDERED that the "Petition for Leave to Amend"[32] filed September 2, 1988, by Jorge G. Blanco Galdo IS GRANTED, and the amendment changing his transmitter site IS ACCEPTED;

IT IS FURTHER ORDERED that unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules,[33] the application of Efrain Archilla-Diez (File No. BPH-861027MI) for a construction permit for a new FM station on Channel 225A in Naguabo, Puerto Rico, IS GRANTED, and the competing applications of Francisco Resto Torres d/b/a Naguabo Broadcasting Company (File No. BPH-861023MA), Jorge G. Blanco Galdo (File No. BPH-861027ME), Reyes Ruiz Rivera (File No. BPH-861027MF), and Hector Negroni Cartagena (File No. BPH-861027MH) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Stirmer
Administrative Law Judge

FOOTNOTES

[1] The applications of Cesar D. Gonzalez, Victelio R. Martinez d/b/a Eastern Broadcasting, and Naguabo Broadcast Group, Inc., were also designated for hearing, but these applications were dismissed for failure to prosecute by *Order* of the Presiding Judge, released October 7, 1988 (FCC 88M-3342).

[2] Only those issues specified against the remaining applicants are listed.

[3] By *Memorandum Opinion and Order*, released February 8, 1989 (FCC 89M-379), the Presiding Judge granted summary decision in favor of Negroni on this issue.

[4] 3 FCC Rcd at 4636.

[5] By *Memorandum Opinion and Order*, released March 31, 1989 (FCC 89M-1034), the Presiding Judge granted summary decision in favor of Archilla on the issue of present reasonable assurance of the availability of his currently proposed transmitter site.

[6] Negroni initially stated that he does not intend to proceed with the construction of the Arecibo station while the Naguabo proceeding is pending. (Tr. 1401-1402.) However, after being advised that this proceeding could not reasonably be expected to be resolved in a few months, Negroni said he would begin construction as soon as the construction permit arrives. (Tr. 1402-1403.)

[7] Archilla resides in the municipality of Humacao (municipio), which is contiguous to the municipality of Naguabo. A municipality includes districts or wards (barrios) including one known as the "town" (pueblo), which is the population center of the municipality. (Tr. 1565-1566.) Archilla lives in Punta Santiago, a ward on the north side of Humacao municipality contiguous to Naguabo municipality, approximately six miles and less than a ten-minute drive from Naguabo town. (Tr. 1565-1566, 1642; Archilla Ex. 2, p. 1.) Negroni will continue to live there and does not intend to move to Naguabo if his application is granted.

[8] Acceptance of this amendment, as previously noted, has been held in abeyance pending resolution of the site issue specified against Blanco. In any event, even if Blanco's amendment is ultimately accepted, he would not be permitted to gain any comparative advantage from the amendment. Thus, he would be credited with the lesser area and population of his original proposal.

[9] By *Order*, FCC 88M-3912, relesed November 17, 1988, the Presiding Judge granted Negroni's request for leave to amend his application to specify a new transmitter site. Since Negroni is not permitted to gain any comparative advantage from the amendment, he should be credited with the lesser area and population of his original proposal.

[10] The *HDO*, at paragraphs 7 and 18, accepted Archilla's "Petition for Leave to Amend" his application to specify a new transmitter site. The *HDO* stated that Archilla may not gain any comparative advantage from the amendment. Accordingly, Archilla should be credited with the lesser area and population of his original proposal.

[11] On September 2, 1988, after the *HDO* was released, Blanco filed a "Petition for Leave to Amend" his application to specify a new transmitter site in order to meet the city-coverge issue designated against him. However, the Presiding Judge ordered that the "Petition for Leave to Amend" be "HELD IN ABEYANCE pending evidentiary hearings on the question whether Blanco had reasonable assurance of the availability of [his] originally specified site." (*Memorandum Opinion and Order*, FCC 88M-3909, paragraph 3, released November 17, 1988). The coordinates of Blanco's transmitter site considered in these Findings are those proposed in his amendment. Blanco submitted no evidence under the engineering issues with regard to his originally proposed site.

[12] Blanco had originally planned to file an application with Colon, but Colon decided not to continue with the application. (Blanco Ex. 2, p. 1.)

[13] Blanco graduated from the University of Maryland in May 1986 with a Bachelor's Degree in electrical engineering. (Blanco Ex. 1, p. 3.)

[14] Marin is known by several different names. Initially Blanco Pi and Colon were under the impression the individual's name was Domingo Cruz Rodriguez. It was later learned that the property owner also goes by the names Domingo Cruz Marin and Domingo Rodriguez Marin as well as the nickname Santo. (Tr. 66-67; Blanco Ex. 3, p. 1.)

[15] An English version of the document was also read and signed.

[16] The Spanish-language version of the declaration also appears as Negroni Ex. 4, Attachment A; as an attachment to Negroni Ex. 6, the testimony of Ada Luz Matias; as an attachment to Negroni Ex. 7, the testimony of Encarnacion; as an attachment to Negroni Ex. 8, Marin's written testimony. The certified translation of the Spanish-language version of the declaration is attached in Negroni Ex. 13. The English-language version of the declaration also appears in Negroni Ex. 4, Attachment B.

[17] Martinez presently resides in Chihauhau, Mexico, and is employed as the general manager of Circuit Wise. He previously was employed by Circuit Wise in Puerto Rico. (Tr. 1006.)

[18] Amaro was subpoenaed to testify in this proceeding. The United States District Court for the District of Puerto Rico declined to enforce the subpoena. (Tr. 1963.) Accordingly, in view of the unavailability of the witness, the transcript of a January 12, 1989, deposition of Amaro was admitted into evidence. (*See, Order* of the Presiding Judge, FCC 89M-1712, released June 22, 1989.)

[19] Amaro executed a typewritten lease with Blanco on September 19, 1988. (Tr. 1643.)

[20] Pinott is presently employed part-time at Station WALO-AM, Humacao, Puerto Rico, of which Archilla is the general manager. He is also the 50 percent owner of a beeper business in which Archilla holds the remaining ownership interest. (Tr. 650-652.) Pinott has known Archilla for nine years. He was hired by Archilla for the position that he now holds at WALO. Pinott explained that when he accompanied Archilla when he visited Reverend Amaro, his function was to serve "as a witness" for Archilla. (Tr. 641-643.)

[21] When Archilla handed the September 4 declaration to Amaro, it appeared to Archilla that Amaro had great difficulty reading it. (Tr. 1614-1615.) Amaro testified that without his glasses, he does have difficulty reading. (NBC Ex. 6, p. 24.)

[22] *Louis Adelman*, 29 FCC 1223 (1960), *affirmed sub. nom., Guinan* v. *Federal Communications Commission*, 297 F. 2d 782 (1961).

[23] For the reasons stated, *infra*, the Presiding Judge will grant Blanco's petition for leave to amend and accept his amendment specifying a new transmitter site.

[24] Negroni's arguments to the contrary are unsupported and unpersuasive. Negroni himself has been unable to find a site which complies with both the short spacing and city coverage rules or to find a site less short spaced than the common site specified by NBC, Blanco, and Archilla.

[25] Waivers have been granted involving short spacing of equal or greater magnitudes than involved here. *See,* for example, *Caloosa Television*, 4 FCC Rcd 4762 (1989); *Megamedia*, 67 FCC 2d 1527 (1978).

[26] While the Negroni site is also short-spaced to WTPM(FM), the distance involved is 1.5 kilometers, an amount considered *de minimus*. (Negroni Ex. 10, p. 3.) *See Order*, FCC 88M-3912, released November 17, 1988. Hence, there is no Section 73.207 issue specified against Negroni.

[27] Other cases relied on by Negroni do not provide a basis for waiver. In *Cowles Florida Broadcasting, Inc.*, 60 FCC 2d 372 (1976), the coverage shortfall was minimal, whereas Negroni's shortfall is total. In *Arkansas Educational Television Commission*, 45 RR 2d 432 (1979), the Commission allowed an amended proposal because the amended proposal represented a more efficient use of the frequency and would provide greater overall coverage than the original proposal. The Commission also suggested, but did not require, the use of a translator station to fill in gaps in the applicant's service area. Here, again, Negroni does not seek to use a translator station merely to "fill in" gaps in his proposed service area; he contemplates using a translator station to accomplish the entire task of providing Naguabo with the required minimum city grade signal.

[28] The statement makes reference to a 116 foot tower, not a 500 foot tower.

[29] NBC and Blanco argue that Archilla should be assessed a demerit under the diversification criteria because he will continue to act as an engineering consultant for WAMA in Tampa. These arguments are rejected. Archilla will not hold a significant management position with WAMA so as to justify the imposition of a diversification demerit. He will serve as an engineering consultant (not even chief engineer), and only devote a few days a year to this work. No demerit will be assessed. *Tellyrand Broadcasting*, 103 FCC 2d 476 (1985).

[30] Archilla's 50 percent ownership interest in a beeper business will not interfere with his integration commitment. The operation of the business is handled by Archilla's partner. (Tr. 1592-1593.)

[31] This result would not change even if Negroni and Ruiz were comparatively considered. While Ruiz seeks 100 percent integration credit, he will continue working in his current businesses, a service station and a sound amplification business. Ruiz presently works between 30 and 40 hours per week on those businesses, but stated that he could cut this time to five hours a week by hiring two people, each to take care of one of the businesses. Ruiz derives over 90 percent of his income from these businesses. The service station alone generates revenues of above $400,000 per year. Ruiz has not persuasively demonstrated that he can accommodate his outside business interests so as to fulfill his commitment to his proposed station. *Washoe Shoshone Broadcasting*, 3 FCC Rcd 3948 (1988); *Margaret Garza*, 1 FCC Rcd 1294 (1986). The statement that two employees will be hired is too vague. It is lacking in detail as to how Ruiz will withdraw from his two profitable businesses to satisfy the Commission's integration policies. This is particularly the case because Ruiz lives behind his service station and will possibly locate the radio station there. Thus, in the absence of a persuasive showing how he will divorce himself from the management and operation of his two successful and profitable businesses, Ruiz will receive only part-time integration credit. Such credit is enhanced by virtue of his long-time local residence and civic activities. However, most of Ruiz' civic activity relates to fund raising for organizations many of which he was not a member. He is also Hispanic. He also has some limited broadcast experience, but this was mostly derived from his sound amplification business. Ruiz would rank second behind NBC in overall coverage.

As to Negroni, while Negroni claims 100 percent integration credit, Archilla and NBC argue that such claim should not be credited because Negroni has failed to show how he would reduce his involvement with the religious movement he is affiliated with to meet his integration commitment. These arguments are rejected. There is no showing that Negroni presently spends appreciable time with the "movement" so as to invalidate his integration claim. Rather, the time spent by Negroni on this activity will not interfere with his integration commitment. Thus, he will receive 100 percent integration credit and such claim is not reduced, as argued by NBC, because Negroni is disabled. He may be disabled from doing police work; but this does not mean he is physically incapable of fulfilling his integration commitment.

Negroni's integration credit is enhanced because of his Hispanic descent. He also receives some credit for civic involvement within the service area resulting from his religious activities. *Newton Television, Limited*, 3 FCC Rcd 553 (1988), *modified in part*, 4 FCC Rcd 2561 (1989). He is also entitled to enhancement for past broadcast experience, despite not being of recent vintage and gained while Negroni was working under cover. *Radio Jonesboro, Inc.*, 100 FCC 2d 941 (1985). Negroni ranks last in comparative coverage. Thus, while Negroni has enhancement characteristics, they do not match Archilla's in the area of residence within the service area; extent and quality of civic activity and past broadcast experience; and comparative coverage. Thus, even if Negroni were basically qualified, he would not prevail comparatively in this proceeding.

[32] This "Petition for Leave to Amend" was HELD IN ABEYANCE pursuant to the Presiding Judge's *Memorandum Opinion and Order*, FCC 88M-3909, released November 17, 1988.

[33] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-147

In re Applications of

KAREN MARIE VOYLES File No. BPH-881115MD
(hereafter "Voyles")

BAY MEDIA, INC. File No. BPH-881115MI
(hereafter "Bay")

For Construction Permit for a
New FM Station on Channel 274A (102.7 MHz) in
Cedar Key, Florida

HEARING DESIGNATION ORDER

Adopted: March 8, 1990; Released: April 5, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Bay has not completed Item 4 correctly. Bay's application gives a post office box number as the residence address for B. F. J. Timm. Accordingly, Bay must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

3. Bay petitioned for leave to amend its application on October 30, 1989. The accompanying amendment was filed after December 29, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

4. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That Bay shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

8. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Bay IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-151

In re Applications of

STARR/MURA BROADCASTING (hereafter "Starr/Mura")	File No. BPH-871113MA
WBAS, INC. (hereafter "WBAS")	File No. BPH-871113MB
OKUN BROADCASTING COPORATION (hereafter "Okun")	File No. BPH-871113MC
LEVERTY PARTNERSHIP (hereafter "Leverty")	File No. BPH-871113MF
WEBSTER FM RADIO LIMITED PARTNERSHIP (hereafter "Webster")	File No. BPH-871113MH
GEORGE M. RAGSDALE, et al. d/b/a MID-ATLANTIC BROADCASTING COMPANY (hereafter "Mid-Atlantic")	File No. BPH-871113MJ

For Construction Permit for a
New FM Station on Channel 225A, in
Webster, Massachuhsetts

HEARING DESIGNATION ORDER

Adopted: March 8, 1990; Released: April 5, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Starr/Mura has requested a waiver of the Commission's "line-of-sight" rule, 47 C.F.R. § 73.315(b). It claims that: (i) it is operating under severe constraints imposed by separation requirements to WPLM(FM), Plymouth, Massachusetts and WROR(FM) and eight other applicants for Channel 253B in Boston, Massachusetts; (ii) there are two steep knolls directly west of Webster which will shield the northern portion of the town from direct line-of-sight. Starr/Mura indicates that it has done "all that is permissible to maximize coverage to Webster" and therefore requests a waiver of Section 73.315(b). The Commission's Staff has reviewed both Starr/Mura's application and its waiver request, and has concluded that: (i) the applicant indeed will cover the community with the requisite 70 dBu signal required by Section 315(a); and (ii) little blockage will occur, as there is no "major obstruction" as contemplated by the rules. Therefore, Starr Mura's waiver request will be dismissed.

3. The following applicants have petitioned for leave to amend their applications on the dates specified below. The accompanying amendments were filed after January 23, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
Starr/Mura	December 15, 1988; May 22, 1989; January 12, 1990
WBAS	September 13, 1988
Okun	March 23, 1988; October 23, 1989
Leverty	February 17, 1988
Mid-Atlantic	June 30, 1988; October 4, 1988 (engineering)

4. *Leverty*. An engineering study reveals a discrepancy between the 100 meters listed for the antenna height above terrain (HAAT) in Section V-B, Item 7(b)(3) and the 191 meter HAAT calculated from the average of the eight radials listed in Section V-B, Item 19. It appears that the values listed for the HAAT along the eight radials are actually the heights of the average terrain above mean sea level. Drawing on the application as a whole, however, the correct HAAT values can be confidently and reliably derived by subtracting each average terrain value from the antenna radiation center above mean sea level and result in an HAAT of 100 meters. Therefore, this is neither a tenderability nor an acceptability defect. Accordingly, Leverty will simply be required to correct the HAAT values listed in Section V-B, Item 19.

5. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Okun have been unsuccessful. Accordingly, since no determination has been received as to whether the antennae proposed by Okun would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

6. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Okun would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That Starr/Mura's request for waiver of 47 C.F.R. § 73.315(b) IS DISMISSED.

10. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Starr/Mura, WBAS, Okun, Leverty, and Mid-Atlantic ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

11. IT IS FURTHER ORDERED, That, Leverty shall file the corrective amendment called for in paragraph 4 above, with the presiding Administrative Law Judge within 30 days of the release of this Order.

12. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the Air Hazard issue only.

13. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-1

In the Matter of

Local Exchange Carrier Access
Tariff Rate and Earnings Levels

Revisions to Transmittal No. 566
GTE Telephone Operating Company
Tariff F.C.C. No. 1

ORDER

Adopted: March 26, 1990; Released: March 26, 1990

By the Chief, Common Carrier Bureau:

1. On January 5, 1990, the Common Carrier Bureau (Bureau) released an Order To Show Cause in the above-captioned docket.[1] In that Order, we directed certain local exchange carriers (LECs) to reduce specified rates, or to show cause why we should not prescribe reduced rates. GTOC (GTE Service Corporation, GTE North, Inc., and GTE Northwest, Inc.) was among those LECs. GTOC submitted Transmittal No. 566, reducing special access rates for GTOC of Illinois, Iowa, Michigan, Minnesota, Missouri, Ohio, and Wisconsin.[2] American Telephone and Telegraph Company (AT&T) petitioned for rejection, or suspension and investigation, of GTOC's filing, and GTOC replied. GTOC's proposed rate levels have been considered in other Orders in this proceeding, and only the issue petitioned by AT&T remains for consideration here.

2. AT&T asserts that GTOC seeks to impose an unreasonable charge upon customers for converting existing month-to-month high capacity (DS1) special access service to a long-term Optional Payment Plan (OPP). AT&T Petition at 1-4. AT&T states that in addition to reducing rates in response to the *Order To Show Cause*, GTOC has introduced three-year and five-year OPPs that include an Initial Ordering Clause that treats current DS1 customers as newcomers, and under which initiating charges are assessed for each circuit being converted to the long-term plan. *Id.* at 2. AT&T asserts that the conversion from month-to-month to long-term provision and billing is a record revision, like other administrative changes for which no charge is assessed. *Id.* at 3. AT&T states that the GTOC tariff support does not provide any justification for GTOC's disparate classification and rates for virtually identical activities. *Id.*

3. GTOC replies to the AT&T petition by stating that the initial service order charge for customers converting existing DS1 Special Access services from standard month-to-month billing to OPP is fully warranted. GTOC Reply at 1. GTOC states that the charge will be imposed upon customers who change to an OPP because certain costs are incurred in processing the service orders, and that this conversion requires the same order processing as an initial service order. *Id.* at 2. [3] New field identification entries would be provided to the customer for ordering requirements under the proposed OPP. Because of the complexities of the billing and tracking requirements for OPP, a simple change order cannot be used, GTOC states. *Id.* at 2-3.[4]

4. AT&T has offered no compelling argument that the GTOC OPP proposal is so unreasonable as to warrant rejection, and we find that no investigation is warranted at this time.

5. Accordingly, IT IS ORDERED that the petition for rejection or, in the alternative, for suspension and investigation, filed by American Telephone and Telegraph Company against GTE Operating Company Tariff F.C.C. No. 1, Transmittal No. 566, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Local Exchange Carrier Access Tariff Rate and Earnings Levels, CC Docket No. 90-1, Order To Show Cause, DA 90-11, released Jan. 5, 1990 (*Order To Show Cause*).

[2] GTOC filed Transmittal No. 570 on February 12, 1990, under special permission, to defer the Optional Payment Plan provision of its Transmittal No. 566 for future and separate consideration. *See* GTOC Revisions to F.C.C. Tariff No. 1, Transmittal No. 570, filed Feb. 12, 1990, under Special Permission No. 90-142.

[3] GTOC states that its current rate structure includes a rate differentiation between the first Special Access line (SAL) and additional SALs ordered by the same customer at the same time and between the same locations, and that with the proposed OPPs, GTOC must maintain a tracking mechanism to ensure that the first SAL rate is applied only to the first SAL between the same locations, and that all subsequent SALs will be rated at the additional SAL rate, regardless of when ordered. GTOC Reply at 2. The current billing system would thus be modified, in accommodating the proposed OPP, to track this additional SAL process and to identify the in-service dates of every SAL order to determine the proper termination liability charge, GTOC notes. *Id.*

[4] GTOC states that to convert from month-to-month to the OPP without service interruptions requires a current customer to provide all existing circuit identifications and billing account numbers (BANs) on the new OPP service order. Then all existing first and additional SALs must be discontinued from the billing system, and reestablished under the new rate structure. *Id.* at 3. Only in this way, GTOC asserts, can bill verification and validation processes be managed. *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-1

In the Matter of

Local Exchange Carrier Access
Tariff Rate and Earnings Levels

MEMORANDUM OPINION AND ORDER

Adopted: March 26, 1990; Released: March 26, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On January 5, 1990, the Common Carrier Bureau (Bureau) released an Order To Show Cause directing certain local exchange carriers (LECs) to reduce specified rates, or to show cause why we should not prescribe reduced rates.[1] GTE Service Corporation, GTE North, Inc., and GTE Northwest, Inc. (collectively, GTOC); Pacific Bell; and Southwestern Bell Telephone (SWB) were among carriers that filed rate reductions. In a *Supplemental Show Cause Order* released February 15, 1990, we directed these carriers to reduce their rates further, or to show cause why their rates should not be reduced.[2]

II. BACKGROUND

2. The *Show Cause Order* directed several of the GTOC companies to reduce specific rates or to show cause why no reductions were necessary. [3] In response, GTOC submitted Transmittal No. 566, reducing special access rates for GTOC of Illinois, Iowa, Michigan, Minnesota, Missouri, Ohio, and Wisconsin. In the *Supplemental Show Cause Order* we found that GTOC's proposed reductions for Iowa, Michigan, Minnesota, and Ohio were not sufficient, based upon the calculations we made after reviewing each carrier's relevant FCC Form 492. These companies were accordingly directed to reduce these rates further, or to show cause why reduced rate levels should not be prescribed. *Supplemental Show Cause Order* at para. 11.

3. Pacific, directed in the *Show Cause Order* to reduce or show cause for overearnings in two categories, Special Access and Switched Access, filed rates for Switched Access that apparently target a 12 percent rate of return. We found in the *Supplemental Show Cause Order*, however, that Pacific's proposed reduction in Special Access appeared to be inadequate. Although Pacific stated that in both categories it relied on actual data, as reflected in its quarterly reports, to calculate its rates, we found that the revenue data upon which Pacific calculated its Special Access rates showed $2 million less than was shown in Pacific's Forms 492. *Supplemental Show Cause Order* at para. 12. Pacific was accordingly directed to reduce its Special Access rates by a further $2.5 million, or to show cause why these rates should not be reduced. *Id.*

4. The *Show Cause Order* directed SWB to reduce or justify its Common Line (CL) rates. We found in the *Supplemental Show Cause Order* that, although SWB filed a rate reduction for CL, that reduction was substantially less than the reduction that appeared to be required. SWB's data showed revenues considerably lower, and average net investment considerably higher, than were calculated from SWB's Forms 492, and we tentatively concluded that a further reduction of $14.54 million should be made in SWB's Common Line rates.

III. PLEADINGS

5. GTOC submitted an answer stating that migration to lower-revenue high capacity (HiCap) services produced lower than forecasted revenues, so that no rate reductions were due, except $345,000 for Ohio. GTOC also filed Transmittal 575 to reduce Special Access rates in Ohio by $345,000, based on updated forecasts, stating that demand was higher than forecasted for third and fourth quarters 1989. MCI petitioned for rejection of this transmittal, and opposed GTOC's answer. GTOC subsequently filed Transmittal No. 583, reducing rates as required by the *Supplemental Show Cause Order* except for Minnesota. GTOC also filed a reply, stating that no reductions were required in Minnesota because GTOC has only nine Special Access customers in that state, and all results are therefore anomalous.

6. Pacific submitted an answer stating that no further reduction in rates was warranted. Pacific states that the Commission should use third quarter, not second quarter, data from Pacific's Form 492.

7. SWB submitted Transmittal No. 1950, reducing its CL rates by $3.82 million. SWB also submitted an answer, stating that no further reductions are necessary. While it is usually reasonable to use "historical based methodology," SWB argues, unusual circumstances here justify departing from the norm. SWB includes in these "circumstances" its initiation of revenue sharing arrangements with independent companies; a deferred operating income tax study; and other retroactive adjustments. MCI petitions for rejection of the tariff transmittal, and opposes SWB's answer.[4]

IV. DISCUSSION

8. GTOC has made adjustments in Special Access rates as required by the *Supplemental Show Cause Order* in all jurisdictions except Minnesota. While GTOC did not make the required adjustment of $41,000 for Minnesota, GTOC's explanation of anomalous rates and rate of return there is acceptable, and we find that no reduction is required.

9. Although Pacific insists in its answer that it stated on at least two occasions in its previous filing that its rate development was based upon actual Form 492 data, it failed to note that these data had been updated through the incorporation of retroactive adjustments. This was the reason for the discrepancy between the rates Pacific submitted, and the rates we calculated based on Pacific's Forms 492. Pacific has now provided adequate further

explanation of its rates, including data on its retroactive adjustments of Form 492 actual data. Accordingly, we find that no further reduction is needed.

10. SWB has provided further information regarding retroactive adjustments, including its replacement of a National Exchange Carrier Association CL payment with a series of revenue-sharing agreements with independent companies, and a deferred operating income tax study. At our request, SWB has provided work papers detailing the revenue-sharing agreements. SWB has justified its smaller-than-ordered rate reduction, and no further reduction appears to be necessary.

V. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that the petitions to suspend and investigate Southwestern Bell Telephone Company, Tariff F.C.C. No. 68, Transmittal No. 1950 and GTE Operating Companies, Tariff F.C.C. No. 1, Transmittal No. 575, filed by MCI Telecommunications Corporation ARE DENIED.

12. IT IS FURTHER ORDERED that the opposition to the answer to show cause filed by MCI Telecommunications Company against the Southwestern Bell Telephone Companies IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Local Exchange Carrier Access Tariff Rate and Earnings Levels, CC Docket No. 90-1, Order To Show Cause, 5 FCC Rcd 482 (1990) (*Show Cause Order*).

[2] Local Exchange Carrier Access Tariff Rate and Earnings Levels, CC Docket No. 90-1, Memorandum Opinion and Order and Supplemental Order To Show Cause, DA 90-226, released Feb. 15, 1990 (Com.Car.Bur.) (*Supplemental Show Cause Order*). For the complete history and background of this proceeding, *see* Local Exchange Carrier Access Tariff Rate and Earnings Levels, CC Docket No. 90-1, DA 90-253, released Feb. 21, 1990 (Com.Car.Bur.) (*Show Cause Response Order*).

[3] GTOC was ordered to file further reductions, or answers, for Iowa ($98,000), Michigan ($223,000), Minnesota ($41,000), and Ohio ($1.659 million) (all for Special Access, all in addition to previous reductions).

[4] MCI contends that SWB has not demonstrated that its reduction is sufficient, that the Commission should change its calculation methodology, or that the Commission inappropriately ignored the retroactive adjustments to the second quarter Form 492 data.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 89-624

In the Matter of

Represcribing the
Authorized Rate of Return
for Interstate Services
of Local Exchange Carriers

ORDER

Adopted: March 26, 1990; Released: March 27, 1990

By the Chief, Common Carrier Bureau:

1. This order grants in part and denies in part the Request for Discovery filed in the captioned proceeding on March 2, 1990 by the Consumer Coalition.[1]

2. Section 65.103 of the Commission's Rules[2] allows participants in a rate of return proceeding to file written interrogatories and requests for documents directed to any rate of return submission. Participants may be examined "upon any matter, not privileged, that will demonstrably lead to production of material, relevant, decisionally significant evidence." [3] All responses to discovery requests become part of the record of the represcription proceeding.[4]

3. Consumer Coalition directs parts of its request to each of the initial submissions filed by the Bell Operating Companies (BOCs) and the United States Telephone Association (USTA). In its responsive pleading, USTA states that it will comply with all requests directed to the USTA submission. The BOCs agree to most of the requested discovery, but object to certain of the requests that are directed to the BOC submissions. Since the parties have agreed with respect to much of the discovery, we discuss only those parts of the discovery request that are disputed.

Interrogatory No. 1

4. Consumer Coalition directs the following interrogatory to all BOCs: "Provide any and all data previously withheld from Columns (a) through (g) of Table 10 of Attachment B to the [BOCs'] initial submissions for the years 1990 through 1994."[5]

5. Consumer Coalition's interrogatory refers to Attachment B of the Bureau's January 5, 1990 Order requiring the BOCs to file with their initial rate of return submissions certain data in addition to that required by Part 65 of the Rules.[6] Table 10, columns (a)-(g), asked for the following information to be filed at both the holding company and the operating company level for each of the years 1970-1994: (a) net income; (b) depreciation; (c) net deferred income tax; (d) investment tax credit (ITC); (e) allowance for funds used during construction (AFUDC); (f) subtotal (a)-(e); (g) gross plant additions excluding AFUDC.

6. In responding to the *January 5 Order*, each of the BOCs left one or more of these columns blank for the years requiring forecast data, 1990-1994. US West filed with its submission a Petition for Waiver seeking to be exempted from providing net income forecasts for its operating companies and from providing any of the requested forecast data at the holding company level. US West argued that disclosure of net income forecasts would place it in danger of misleading investors and running afoul of the antifraud provisions of the securities laws. The other BOCs made similar arguments in conjunction with their submissions.

7. In its Request for Discovery, Consumer Coalition states that "it is difficult to take such concerns seriously" when the BOCs are willing to provide other growth estimates for the same period. Consumer Coalition also states that it stands ready to sign a reasonable protective agreement to maintain the confidential status of any information that raises confidentiality problems, and that such an arrangement would alleviate any securities laws concerns.

8. All BOCs object to this interrogatory. They argue that their internal financial forecasts are private and confidential; that the requested data have no bearing on capital structure or cost of debt; that the data will not lead to material, relevant, decisionally significant evidence as to the cost of equity because private financial forecasts play no part in forming investors' expectations about return on their investment; and that the request would be unduly burdensome because the forecasts would have to be continually updated to take account of changed circumstances. NYNEX states that it has provided sufficient projected rate base information to allow others, including Consumer Coalition, to make their own forecasts. BellSouth asks that the Commission either withdraw its request for the data in question or grant to all BOCs the waiver requested by US West.

9. We find that the BOCs' own forecasts of net income are not, and will not lead to, decisionally significant evidence in this proceeding. Non-public financial forecasts are not likely either to influence or reflect the investor-required return on investment for interstate access services. Furthermore, the forecasts would be of little value as evidence of the appropriate rate of return because the forecasts themselves necessarily incorporate assumptions about what the prescribed rate of return will be. We therefore deny the request for discovery of data omitted from column (a) of Attachment B, Table 10, for the years 1990-94. We do not require submission of these data.

10. We find that the operating company data in columns (b), (c), (d), (e), and (g) are material, relevant, and possibly of decisional significance in the resolution of issues which the carriers have raised concerning the rate of investment in telecommunications infrastructure. On the other hand, we find that holding company-level data in columns (b)-(g) are not needed in this proceeding. The only additional information to be gleaned by requiring these columns to be filled in at the holding company level would be the amounts of depreciation, deferred taxes, investment tax credits, and gross plant additions projected, in the aggregate, for all of an operating company's nonregulated affiliates. We find that the BOCs' own forecasts of these data are not, and will not lead to, decisionally significant evidence as to the rate of return for interstate access services. We therefore deny the re-

quest for discovery of holding company data omitted from columns (b)-(g) of Attachment B, Table 10, for the years 1990-94. We do not require submission of these data.

Request for Production of Documents No. 1

11. Consumer Coalition requests that the BOCs, separately or together, provide to it the Standard & Poor's Compustat data base of over 7000 firms from which US West, Bell Atlantic, and Ameritech selected certain subgroups of firms for their analyses of the cost of equity for comparable firms. Consumer Coalition argues that, in order to probe the BOCs' comparable firms analyses, it must have access to the complete universe of data used to select the firms. Consumer Coalition states, "Although this data is available from Compustat, the cost is prohibitive. None of the members of the Coalition have monopoly ratepayers to whom they can pass on such costs."[7]

12. All BOCs object to the request for production of the Compustat data base. They state that their subscription agreements with Standard & Poor's allow them to have access to Compustat but not to copy it or provide access to third parties, and that copying the data base would violate Standard & Poor's copyright. They argue that the cost of subscribing to the data base is about $20,000, and that this cost could not possibly be prohibitive for a company the size of MCI or for the large companies which make up ICA. They also note that it is very likely that some of the members of ICA subscribe to Compustat.

13. It is not the purpose of our discovery rules to provide participants in rate of return proceedings with free copies of commercially-available data. We therefore deny the request for production of the Standard & Poor's Compustat data base.

Request for Production of Documents No. 4.

14. Consumer Coalition requests the following documents from all BOCs: "Any and all presentations by the [Regional holding companies] to financial rating agencies and to financial analysts, or documents used in preparing or making such presentations, dated from January 1, 1984 to the present."[8]

15. In support of this request, Consumer Coalition states that "it might be quite revealing to see what they have told financial rating organizations and analysts about the impact of nonregulated operations in their expected growth and the impact of potential competition in the interstate market."[9] Consumer Coalition argues that these reports have probative value even if they were not relied upon by the BOC expert witnesses in preparing their testimony.

16. The BOCs do not object to providing recent presentations to securities analysts, but they argue that older presentations are irrelevant to current determinations of the cost of capital. Bell Atlantic and US West agree to provide these reports back to 1987; Ameritech, NYNEX, and Pacific agree to provide reports going back to 1988; Southwestern Bell states it will provide reports for the preceding year only; and BellSouth states it will provide only the "latest" reports.

17. All BOCs object to providing copies of the information which they have provided to bond rating agencies. They argue that such information is highly confidential; that bond rating agencies have the status of "insiders" under the securities laws and do not reveal to investors the confidential material made available to them by companies; and that, while investors do rely on the bond ratings produced by the rating agencies, their perceptions are not influenced by the underlying information supplied to the rating agencies by companies.

18. We find that the presentations made by the BOCs to investment analysts since the time of our last rate of return prescription are material, relevant, and potentially of decisional significance in resolving issues which have been raised in the initial submissions. Presentations made before that time are not, and are not likely to lead to, decisionally significant evidence in this proceeding. We therefore deny the request for production of presentations made to financial analysts prior to January 1, 1987.

19. We find that the information provided by BOCs to financial rating agencies is not, and will not lead to, decisionally significant evidence in this proceeding. Because this information is held in confidence by the rating agencies, it neither influences nor reflects the investor-required return on investment. We therefore deny the request for production of presentations made to financial rating agencies.

Other issues

20. Consumer Coalition states that its request for discovery is continuing in nature. Southwestern Bell argues that its duty to provide information on a continuing basis should be reasonably limited, and that the date for submission of carrier rebuttals should be the final date for requiring updates to the discovery request. We agree with Southwestern Bell and limit the grant of continuous discovery so that the duty of the BOCs and USTA to respond to the instant discovery request shall cease on the date upon which carrier rebuttals are filed.

21. BellSouth argues that the entire request for discovery should be rejected on the grounds that Consumer Coalition failed to make a threshold showing that any part of its request would demonstrably lead to material, relevant, decisionally significant evidence. BellSouth advocates a stringent application of this standard because, it claims, the Bureau will be required to extend the time for filing responsive submissions if it grants discovery. BellSouth states that the timing of discovery pleadings under §65.103 virtually precludes production of discovered material before responsive submissions are due. We reject this reasoning as a basis for wholesale denial of discovery. It is true that the rules make it extremely unlikely that a discovery request directed to an initial submission would ever be granted before responsive submissions were due. We do not, however, consider either the pendency of a discovery request or the grant of discovery as reasons to extend the time for filing responsive submissions. Discovered material becomes part of the public record of the proceeding, and all parties have an adequate opportunity to comment upon its significance in the second round of pleadings, when they submit their proposed findings and conclusions.

22. Accordingly, IT IS HEREBY ORDERED that the Request for Discovery filed in the captioned proceeding on March 2, 1990 by Consumer Coalition IS DENIED to the extent indicated herein, and IS GRANTED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION

Richard Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] The Consumer Coalition consists of the Consumer Federation of America, International Communications Association, and MCI Telecommunications Corporation.

[2] 47 CFR §65.103.

[3] *Id.*

[4] 47 CFR §65.103 (c).

[5] Consumer Coalition Request for Discovery at 4.

[6] Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 543 (1990) (*January 5 Order*).

[7] Consumer Coalition Request for Discovery at 12.

[8] Consumer Coalition Request for Discovery at 9.

[9] *Id.* at 15.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southernnet of South Carolina, Inc.	I-T-C-90-015
Teleconnect Long Distance Service and Systems Company	I-T-C-90-016
Cable & Wireless Communications, Inc.	I-T-C-90-017

Applications for authority to acquire and operate terrestrial facilities to provide switched communications services between the United States and Canada.

ERRATA

Released: March 28, 1990

By the Chief, International Facilities Division:

1. On February 23, 1990, the Commission released a *Memorandum Opinion, Order, Authorization and Certificate* (*Order*) adopted by the Chief, International Facilities Division in the above-captioned proceeding, DA 90-231, *erratum*, DA 90-338 (released March 6, 1990). The instant *Errata* corrects the *Order* to delete paragraphs 4, 6, and 7 and footnote 2; and to delete from paragraph 13 the phrase " *see supra* para. 7." Paragraph 9(a) and (b) are corrected to read as follows:

> (a) lease and operate switching and transmission facilities provided by Metromedia at Seattle, Washington, Albany and New York City, N.Y. (via Rouses Point), Detroit, Michigan and Buffalo, N.Y.;
>
> (b) lease and operate the following channels provided by MCI between ICG operating offices set forth in para. 9(a) and the U.S./Canada border:

* * * *

Paragraph 5 and paragraph 9(c) are corrected to replace the phrase "switched communications services" with the phrase "message telecommunications services."

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-600

In the Matter of

Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service

ORDER DENYING MOTIONS FOR EXTENSION OF TIME TO FILE REPLY COMMENTS

Adopted: March 27, 1990; Released: March 28, 1990

By the Chief, Mass Media Bureau:

1. On December 12, 1989, the Commission adopted a *Notice of Inquiry* (*Notice*), 5 FCC Rcd 362 (1989), in the above-captioned proceeding. The *Notice* was adopted, in part, to comply with the statutory directive contained in the Cable Communications Policy Act of 1984 that the Commission conduct a comprehensive study of cable industry operations and, based on that study, prepare and submit to Congress a report analyzing the effect on the video service marketplace of substituting market forces for cable rate regulation. The *Notice* established April 2, 1990 as the deadline for filing reply comments in this proceeding.

2. On March 20, 1990, Tele-Communications, Inc. (TCI) filed a "Motion for Extension of Time to File Reply Comments" requesting a three-week extension of time. TCI contends that the additional time is needed to review the extensive record compiled in this proceeding. TCI asserts that the large volume of comments and the number of potentially interrelated and complex issues raised therein demonstrates that good cause for an extension of time exists. According to TCI, identifying the underlying factual information cited in the various comments, analyzing the economic analyses submitted by certain parties, and developing responsive factual information in this unusually extensive and complex proceeding necessitates the requested extension. TCI submits that because the parties will be better able to focus their remarks, the requested extension will expedite, rather than delay, the Commission's proceedings.

3. In response to TCI's request, the National Association of Broadcasters (NAB), the Association of Independent Television Stations, Inc. (INTV) and the National Cable Television Association, Inc. (NCTA) filed statements supporting a three-week extension of time.

4. On March 23, 1990, Cole, Raywid and Braverman requested a two-week extension of time for filing reply comments on behalf of various cable operators and associations. Like TCI, these parties submit that an extension is necessary because of the large volume of comments filed and the extensive issues covered and they urge that an extension of two weeks will not unreasonably delay the proceeding.

5. As set forth in Section 1.46 of the Commission's rules, 47 C.F.R. §1.46, it is our policy that extensions of time not be routinely granted. The Commission has granted extensions of time upon a showing of exceptional circumstances or of good cause. We do not believe that a sufficient showing has been made in this instance. We are mindful of the volume of comments submitted in this proceeding and the complexity of the issues involved. In setting the reply deadlines, however, we anticipated a response of such magnitude and complexity. We continue to believe that this is sufficient time for the parties to prepare their submissions. Petitioners' showings have failed to convince us otherwise.

6. Accordingly, IT IS ORDERED that the Motion for Extension of Time to File Reply Comments, filed by Tele-Communications, Inc., and the Request for Extension of Time for Filing Reply Comments, filed by Cole, Raywid and Braverman, ARE DENIED.

7. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and Sections 0.204(b), 0.283 and 1.46 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

New England Telephone and Telegraph Company
Tariff F.C.C. No. 40

Transmittal No. 1030

ORDER

Adopted: March 28, 1990; Released: March 28, 1990

By the Chief, Common Carrier Bureau:

I. BACKGROUND

1. On December 29, 1989, New England Telephone and Telegraph Company (NET) filed Transmittal No. 1030, which would establish rates and charges for "diverse routes" for special access services provided to Boston Safe Deposit & Trust Co. (BSDT) and Bank of New England (BNE).[1] Metropolitan Fiber Systems, Inc. (MFS) filed a petition to reject or suspend and investigate Transmittal 1030, to which NET replied. NET Transmittal 1030 is scheduled to become effective March 29, 1990.

2. For BSDT, NET proposes a diverse route between the Malden, Massachusetts, Central Office and BSDT's premises on Cabot Road in Medford, Massachusetts. NET states that BSDT will lease tariffed services at prevailing tariffed rates, but also declares that the diverse route is offered on an Individual Case Basis (ICB). NET states that three months' notice is required to terminate service, and proposes assessing BSDT a monthly recurring charge of $1,600 and a nonrecurring charge (NRC) of $107,000. NET does not identify the capacity of the proposed diverse route or what types of services the customer intends to route diversely.

3. NET proposes two diverse routes for BNE; one connecting a BNE premises to NET's Westboro, Massachusetts, Central Office, and the other connecting a BNE premises to NET's Framingham, Massachusetts, Central Office. NET states that once these fiber optic cable routes are established, BNE may request that either route be used to provide 1.544 Mbps dedicated service (*i.e.*, DS1 service) at the prevailing tariff rates. NET states that three months' notice is required to terminate service, and proposes assessing BNE an NRC of $234,306.

II. SUMMARY OF PLEADINGS

4. MFS asserts that NET Transmittal 1030 fails to describe adequately the services it proposes to offer, and appears to offer services on differing pay schedules. For example, says MFS, BSDT pays both an NRC and a monthly recurring charge while BNE pays only a NRC. MFS Petition at 2. Therefore, argues MFS, NET Transmittal 1030 appears to provide service at discriminatory rates and on discriminatory terms and conditions in violation of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a). It states that NET fails to explain the relationship between its NRC and monthly charges, or why apparently identical services are subject to two separate pricing schemes. *Id.* at 3. MFS contends that NET fails to identify the capacity of the service offered to BSDT and does not state whether the service is an end-to-end or dim fiber arrangement, making it impossible to determine whether the offering is a DS3 or DS3 equivalent service. *Id.* at 2. Therefore, MFS concludes, NET may be in violation of the Commission's *ICB Order*.[2]

5. MFS further argues that the nonrecurring charge pricing structure for the customers indicates that a special construction arrangement is contemplated in each case, although NET's cost support material states that no special construction is employed. *Id.* at 3. MFS maintains that without a more complete description of each service it is impossible to tell whether Section 61.38(f) of the Commission's Rules, 47 C.F.R. § 61.38(f), is applicable, and if so, whether NET is in compliance with that rule.[3] MFS requests the Commission to reject, or alternatively, suspend NET Transmittal 1030 pending investigation of NET's proposed ICB arrangements. *Id.* at 4.

6. NET replies that its tariff does not establish an agreement for provision of high capacity services, and is neither an end-to-end nor a dim fiber arrangement, as MFS suggests. NET Reply at 2.[4] NET states that the purpose of a diverse route is to provide a customer with a back-up facility in the event its primary service is interrupted. *Id.* at 3. NET indicates that the customer pays for all services provided on its primary route, as well as for any service provided over the diverse route, under the applicable general tariffs. NET maintains that it tailored the pricing structures for the diverse routes based on customer preference for either a single lump sum payment or a smaller initial payment combined with monthly charges. *Id.* at 4. According to NET, costs for diverse routing vary widely depending on a customer's specific needs, and therefore ICB pricing for such arrangements is appropriate.

III. DISCUSSION

7. Carriers must meet a substantial burden in attempting to demonstrate any justification for individualized rates. Essentially, the carrier must demonstrate that the service it seeks to tariff at ICB rates differs sufficiently from the services the carrier generally provides to justify this extraordinary ratemaking approach. As the Commission noted in its *ICB Order*,

> Although the [Communications] Act does not expressly require general offerings, the Act does require the carriers to establish charges that do not result in "unreasonable" discrimination among customers of "like" telecommunications services. This obligation is normally interpreted as requiring that carrier offerings be generally available to all similarly situated customers. *See Sea - Land Services, Inc. v. ICC*, 738 F.2d 1311, 1317 (D.C.Cir. 1984); *AT & T Communications*, 4 FCC Rcd 4932, 4938 (1989) (*Tariff 12 Order), recon. denied*, 4 FCC Rcd 7928 (1989). It might theoretically be possible to devise a scheme for developing individual rates for each facility that does not produce discrimination, but it would be extremely difficult to establish a

scheme that would produce individual facility rates that are rationally related to each other in some manner that is fair, just, and reasonable.

ICB Order, 4 FCC Rcd at 8642.

8. The Commission did conclude that the discrimination that resulted from ICB pricing of a very limited number of DS3 circuits as a transitional mechanism is not, *per se*, unreasonable. Nevertheless, a carrier must demonstrate in each case that ICB pricing is necessary and appropriate. This NET has failed to do. NET has not shown, for example, that the costs of provisioning diverse routing service are not susceptible to averaging. Indeed, NET has not demonstrated that the provisioning of diverse routing service differs in any material respect from the provisioning of the service carried over the primary route. In this sense, diverse routing service is not a new or unique service. To the extent differences do exist between diverse routing service and other services that NET provides, NET has not shown that such differences render averaged ratemaking impracticable or provide any justification for the use of ICB rates. The Description and Justification (D&J) supporting NET's filing does not address any of these issues.

9. NET does assert in its reply that "customer requirements [for diverse routing] vary widely" and that costs may differ "depending on the desires of . . . customers to avoid certain routes or transport facilities or to direct their traffic through particular central offices." NET Reply at 4. We do not find these claims persuasive. As we have noted, the type of facilities provided by NET in the case of diverse routing service does not seem to vary in any material respect from the type of facilities NET is in the business of providing on a general basis as a common carrier. Moreover, as the Commission noted in the *ICB Order*, cost differences can be shown to exist between particular customers for any service. Therefore, the Commission concluded, the fact that the cost of providing service to individual customers varies is not sufficient to justify ICB rates. *ICB Order*, 4 FCC Rcd at 8644.

10. For the foregoing reasons, we conclude that NET has not demonstrated that ICB pricing for diverse routes is warranted. Accordingly, we conclude that NET's ICB pricing of diverse routing service is unreasonably discriminatory in contravention of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), for the reasons stated in the Commission's *ICB Order*. We therefore reject the captioned transmittal as patently unlawful.

IV. ORDERING CLAUSES

11. For the reasons stated above, we conclude that the tariff revisions in Transmittal No. 1030 are patently unlawful because those provisions violate established Commission precedent and Section 202(a) of the Communications Act, 47 U.S.C. § 202(a).

12. Accordingly, IT IS ORDERED that pursuant to Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), the individual case basis rates for diverse routing service in New England Telephone and Telegraph Company, Tariff F.C.C. No. 40, Transmittal No. 1030, ARE REJECTED.

13. IT IS FURTHER ORDERED that the petition to reject, suspend, or investigate New England Telephone and Telegraph Company Tariff F.C.C. No. 40, Transmittal No. 1030, filed by Metropolitan Fiber Systems, Inc., IS GRANTED to the extent provided herein.

14. IT IS FURTHER ORDERED that New England Telephone and Telegraph Company SHALL ISSUE revisions to the tariff no later than five business days from the release of this Order removing the rejected material. These revisions shall be scheduled to become effective on not less than one day's notice.

15. IT IS FURTHER ORDERED that Special Permission No. 90-320 is assigned and Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, are waived for the purpose of issuing the above revisions.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] According to NET, diverse routes provide an alternative transmission path in the event of service interruption on the primary channel.

[2] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, FCC 89-339, 4 FCC Rcd 8634 (1989), *recon. pending* (*ICB Order*).

[3] Section 61.38(f) requires that where special construction is involved, concurrent with the filing of any rate for such construction developed on the basis of estimated costs, the offering carrier must send the customer a copy of the explanation and data required to be filed with special construction tariff offerings.

[4] Concurrently filed with NET's reply was a motion to accept a late-filed pleading. NET alleges that MFS served NET by mail a copy of the petition to reject or suspend but that the petition was not actually received by NET until January 31, 1990, 15 days after MFS filed its petition with the Commission and after NET's deadline to reply. According to NET, it notified MFS that NET wished to file a reply and received assurances that MFS would not oppose its motion. The motion filed by NET is granted.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 22, 1990

THIRD INTERIM REPORT ON ADVANCED TELEVISION SERVICE RELEASED

The Commission has released the main text of the Third Interim Report of the Advisory Committee on Advanced Television Service (minus the appendices). The report was adopted at a meeting of the Advisory Committee on March 21, 1990. The complete report is available from the Commission's contractor for public record duplication, International Transcription Services, Inc., with offices in the FCC Headquarters, 1919 M Street, N.W., Room 246, Washington, D.C. Orders may be placed at (202) 857-3800. Members of the press may contact the Commission's Office of Public Affairs, 1919 M Street, N.W., Room 202, Washington, D.C. The public may view the full report at the Dockets Reference Room (Room 239) in the Commission's Headquarters during regular business hours.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 28, 1990

ADVISORY COMMITTEE ON ADVANCED TELEVISION SERVICE PLANNING SUBCOMMITTEE MEETING

A meeting of the Planning Subcommittee of the Advisory Committee on Advanced Television Service will be held on:

May 11, 1990

10: 00 a.m.

Commission Meeting Room (Room 856)

1919 M Street, N.W.

Washington, D.C.

The purpose of this meeting to receive the reports of the Subcommittee's working parties and to review the work statement for the fourth period of Planning Subcommittee activities.

The agenda for the meeting is as follows:

1. Call to Order by the Chairman
2. Adoption of the Minutes of the Sixth Meeting
3. Introductory Remarks
4. Review of the Work Statement
5. Status Reports by the Working Party and Advisory Group Chairs
6. Other Business
7. Date and Location of the Next Subcommittee Meeting
8. Adjournment

This meeting is open to the public.

Parties may submit written statements prior to or at the time of the meeting. Oral statements and discussion will be permitted under the direction of the Subcommittee Chairman.

Any questions regarding this meeting should be directed to Joseph A. Flaherty at (212) 975-2213 or William Hassinger at (202) 632-6460.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 28, 1990

ADVISORY COMMITTEE ON ADVANCED TELEVISION SERVICE IMPLEMENTATION SUBCOMMITTEE MEETING

A meeting of the Implementation Subcommittee of the Advisory Committee on Advanced Television Service will be held on:

April 17, 1990

10:00 A.M.

Commission Meeting Room (Room 856)

1919 M Street, N.W.

Washington, D.C.

The agenda for the meeting will consist of:

1. Introduction
2. Minutes of Last Meeting
3. Report of Working Party 1
   Policy and Regulation
4. Report of Working Party 2
   Transition Scenarios
5. General Discussion
6. Other Business
7. Date and Location of Next Meeting
8. Adjournment

All interested persons are invited to attend. Those interested also may submit written statements at the meeting. Oral statements and discussion will be permitted under the direction of the Implementation Subcommittee Chairman.

Any questions regarding this meeting should be directed to Dr. James J. Tietjen at (609) 734-2237 or David R. Siddall at (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WORLD COMMUNICATIONS, INC. File No. I-T-C-90-039

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell switched voice services for the provision of switched voice services to various international points.

MEMORANDUM OPINION, ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 30, 1990; Released: April 5, 1990

By the Chief, International Facilities Division:

1. On December 15, 1989, World Communications, Inc. (Worldcom) filed with the Commission an application for authority, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. Section 214, to resell the switched voice services set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2 for the provision of switched voice services for the points listed in those tariffs.[1] Worldcom proposes to price such service offerings at or above an underlying carrier's rates, as specified in the above-referenced tariffs or any successor tariffs of the carrier that may include similar service offerings. The application is unopposed. For the reasons stated below, we grant the application in part and deny it in part.

2. Worldcom is a common carrier authorized to provide international private line service and to hold cable landing licenses. Worldcom is a wholly-owned subsidiary of Tele-Columbus USA, Inc., a Delaware corporation, which in turn is a wholly-owned subsidiary of Tele-Columbus AG, which itself is a wholly-owned subsidiary of Motor Columbus AG. Tele-Columbus AG and Motor-Columbus AG are entities organized under the laws of Switzerland. Worldcom is a foreign-owned carrier under the Commission's *International Competitive Carrier* policies, 102 F.C.C. 2d 812, 842 (1985), *recon. denied*, 60 Rad. Reg. 2d (P&F) 1435 (1986), and is dominant in its provision of international common carrier services between U.S. and international points. *See Western Union Corporation and World Communications, Inc.*, 4 FCC Rcd 2219 (Com. Car. Bur. 1989).

3. As a dominant carrier in its provision of international common carrier services, Worldcom remains subject to traditional facilities authorization requirements and rate regulation. Our Section 214 authorizations to dominant carriers specify the facilities they may acquire or lease to provide a particular service to the authorized international points. In the case of resale carriers, these orders authorize carriers to provide an identified resale service, such as international switched voice, by reselling the services set forth in a particular underlying carrier tariff to specified international points. Dominant carriers seeking to supplement or modify their existing authorizations must do so by formal application. Such applications are required where the dominant carrier seeks to provide a new service, resell an additional offering not specified in its existing Section 214 authorizations, or serve additional points set forth in the underlying carriers' tariffs but not specified in the resellers' existing Section 214 authorizations.

4. In the instant application, Worldcom seeks authority to resell the switched voice services set forth in the tariffs of the three underlying carriers to the points listed in the attachment to its March 12, 1990 letter, *see supra* n.1. However, several of these points are offshore domestic U.S. points for which Worldcom need not seek Section 214 authority to resell the switched voice services of the underlying carriers. *See Competitive Carrier, Third Report and Order*, Mimeo No. 012, released October 6, 1983, 48 Fed. Reg. 46,791 (October 15, 1983).[2] Moreover, a number of the points listed are not served by all three carriers. US Sprint does not serve the Seychelles, Congo, Iraq, or Syria.[3] MCI does not serve Syria.[4] We will not authorize Worldcom to resell the services of an underlying tariff to points that currently are not served by the underlying carrier.

5. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that the present and future convenience and necessity require the provision of resale of international switched voice service by Worldcom between the United States and the points listed in Appendix A to this decision.

6. Accordingly, IT IS ORDERED that the application of Worldcom, File No. I-T-C-90-039, IS GRANTED IN PART and DENIED IN PART, and Worldcom is authorized to provide international switched voice services set forth in AT&T's Tariff F.C.C. No. 1 between the United States and those points listed in Attachment A, in MCI's Tariff F.C.C. No. 1 between the United States and those points listed in Attachement A except Syria, and in US Sprint's Tariff F.C.C. Nos. 1 and 2 between the United States and those points listed in Attachment A except the Seychelles, Congo, Iraq and Syria. This Section 214 authorization is limited to Worldcom's resale of the international switched voice services set forth in the above-referenced tariffs of AT&T, MCI and US Sprint. It does not provide Worldcom with the authority to resell services set forth in any successor tariffs of AT&T, MCI or US Sprint. Thus, should Worldcom seek to resell the services of AT&T, MCI or US Sprint as set forth in any successor tariffs of these carriers, it must separately request authority to do so.

7. IT IS FURTHER ORDERED that Worldcom SHALL FILE copies of any operating agreement entered into by itself or its parent/affiliate with its correspondents within 30 days of its execution.

8. IT IS FURTHER ORDERED that Worldcom SHALL FILE quarterly reports of revenue, number of messages, and number of minutes of originating and terminating traffic for all countries authorized in para. 6 individually within 90 days from the end of each calendar quarter.

9. IT IS FURTHER ORDERED that the applicant SHALL FILE tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this decision.

10. IT IS FURTHER ORDERED that the applicant SHALL FILE the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61.

11. IT IS FURTHER ORDERED that Worldcom SHALL FILE annual traffic and revenue reports as provided in 47 C.F.R. Section 43.81 concerning traffic originating or terminating within the United States.

12. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

Attachment A

APPLICATION OF WORLD COMMUNICATIONS, INC.
FCC File No. I-T-C-90-039

International/Overseas Service Points Covered by Application

Algeria
Andorra
Anguilla
Antigua
Argentina
Aruba
Ascension Island
Australia
Austria
Bahamas
Bahrain
Bangladesh
Barbados
Belgium
Belize
Benin
Bermuda
Bolivia
Botswana
Brazil
British Virgin Islands
Brunei
Bulgaria
Cameroon
Canada
Cape Verde Islands
Cayman Islands
Chile
China
Colombia
Congo
Costa Rica
Cyprus
Czechoslovakia
Denmark
Dominica
Dominican Republic
Ecuador
Egypt
El Salvador
Ethiopia
Faeroe Islands
Fiji Islands
Finland
France
French Antilles
French Guiana
French Polynesia
Gabon
Gambia
Germany, East
Germany, West
Ghana
Gibraltar
Greece
Greenland
Grenada
Guadaloupe
Guantanamo Bay
Guatemala
Guinea
Guyana
Haiti
Honduras
Hong Kong
Hungary
Iceland
India
Indonesia
Iran
Iraq
Ireland
Israel
Italy
Ivory Coast
Jamaica
Japan
Jordon
Kenya
Kiribati
Korea, South
Kuwait
Lesotho
Liberia
Libya
Liechtenstein
Luxembourg
Macao
Malawai
Malaysia
Maldives
Malta
Marshall Islands
Mauritius
Mexico
Micronesia
Monaco
Montserrat
Morocco
Namibia
Nauru
Nepal
Netherlands
Netherlands Antilles
Nevis
New Caledonia
New Zealand
Nicaragua
Niger
Nigeria
Norway
Oman
Pakistan
Panama
Papua New Guinea
Paraguay
Peru
Philippines
Poland
Portugal
Qatar
Romania
Rwanda
San Marino
Saudi Arabia
Senegal
Seychelles Islands
Singapore
Solomon Islands
South Africa
Spain
Sri Lanka

St. Kitts
St. Lucia
St. Pierre & Miquelon
St. Vincent & Grenadines
Suriname
Swaziland
Sweden
Switzerland
Syria
Taiwan
Tanzania
Thailand
Togo
Tonga
Trinidad & Tobago
Tunisia
Turkey
Turks & Caicos Islands
Uganda
United Arab Emirates
United Kingdom
Uruguay

USSR (Moscow Only)
Vatican City
Venezuela
Yemen Arab Republic
Yugoslavia
Zaire
Zambia
Zimbabwe

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] On March 12, 1990, in response to a staff request, Worldcom provided the Commission with a list of the specific countries to which it seeks authority to resell the switched voice services of AT&T, MCI and US Sprint. *See* letter of March 12, 1990 from Robert E. Conn, Counsel for Worldcom to Chief, International Facilities Division.

[2] However, the provisions of Section 43.81 of the Commission's Rules apply with respect to these domestic points. *See* 47 C.F.R. Section 43.81 (1989).

[3] *See* US Sprint Tariffs F.C.C. Nos. 1 and 2.

[4] *See* MCI Tariff F.C.C. No. 1.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-140

In the Matter of

Amendment of Part 74 of the	RM-5416
Commission's Rules Concerning	RM-5472
FM Translator Stations	

NOTICE OF PROPOSED RULE MAKING

Adopted: March 8, 1990; Released: March 28, 1990

By the Commission: Commissioner Duggan not participating.

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Appendix A: Commenters
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INTRODUCTION

1. On March 24, 1988, the Commission adopted a *Notice of Inquiry* (*NOI*), 3 FCC Rcd 3664 (1988), to study the role of FM translators in the radio broadcast service. Therein, we sought comment on all aspects of our general policies regarding FM translators, as well as specific proposals for revisions to our rules regarding the authorization and operation of FM translators. By this *Notice of Proposed Rule Making* (*Notice*), we propose to amend the rules governing the FM translator service based on the comments submitted in response to the *NOI* and our own analysis of the translator service. We propose to restructure our FM translator rules consistent with the intended purpose of this service, which is to provide supplementary service to areas in which direct reception of radio broadcast stations is unsatisfactory due to distance or intervening terrain barriers. In particular, we propose to revise and clarify the FM translator rules, including new rules for: ownership and financial support of translators; methods for selecting among translator applications; the definition of "major change" in translator coverage areas; use of commercial, noncommercial and auxiliary band frequencies; interference criteria; and technical requirements for translators.

BACKGROUND

2. FM translators are stations that receive the signals of FM radio broadcast stations and simultaneously retransmit those signals on another frequency.[1] In general, the signal of the FM radio broadcast station being rebroadcast[2] must be received directly over-the-air at the translator site.[3] FM translators were first authorized in 1970[4] as a means to provide FM service to areas and populations that were unable to receive satisfactory FM signals due to distance or intervening terrain obstructions.[5] While the Commission recognized the benefits of authorizing FM translator service, it also expressed concern regarding the possible competitive impact such translators could have on FM radio broadcast stations and the effect their authorization could have on the licensing of those stations.[6] Thus, the Commission elected to authorize FM translators on a secondary basis only and imposed rules that restrict their service, ownership, financial support and program origination.[7] The FM translator rules currently in effect are essentially the same as those adopted in 1970.

3. Seven parties submitted petitions for rule making seeking various, sometimes conflicting changes to our FM translator rules.[8] In its petition, the National Association of Broadcasters (NAB) requested the Commission to impose financial support and profit-making restrictions on FM translators to prevent their use by FM radio broadcast stations to expand their service areas. The NAB also asked

the Commission to tighten the technical rules to prevent interference from translators to FM radio broadcast stations. The other petitioners generally sought expansion of the current translator service, including program origination authority.

4. NAB's petition indicated that there is considerable concern about the adverse impact of FM translators upon FM radio broadcast stations under the existing rules, while other petitioners expressed an interest in new and expanded uses of FM translators. In light of the concerns and interests expressed by the petitioners on both sides of this matter, we concluded that a broad reexamination of our FM translator regulatory scheme would be timely and appropriate. Accordingly, we adopted the *NOI* to initiate a reevaluation of FM translator rules and policies. Therein, we sought comment on the appropriate regulatory structure for the authorization of FM translator stations. However, at the outset, we emphasized that in undertaking this reevaluation of the FM translator service, we did not intend to alter our basic approach of authorizing FM translators for the purpose of providing service that is supplemental to the service provided by FM radio broadcast stations. Within this context, commenters were asked to consider whether there is any need to modify our rules to ensure that translator stations do not adversely affect the operation of FM radio broadcast stations. In the *NOI*, we also stated that we would consider policy options for expanding FM translator authority to the extent that such policies would be consistent with the secondary nature of this service.

5. Fifty-six parties filed initial comments in response to the *NOI*, and 15 parties replied.[9] Subsequent to the formal comment period, NAB filed a study of radio listener behavior based on data that were not available during the original comment period. Since we believed that the NAB study included relevant information, we reopened the proceeding to solicit comments on it.[10] We received 13 comments and 23 reply comments regarding the NAB study.

DISCUSSION

6. We continue to believe that the proper role for FM translators is that of a secondary service intended to supplement the service of FM radio broadcast stations.[11] Thus, we will continue to adhere to the policy that the purpose of FM translators is to provide service in areas in which direct reception of radio service is unsatisfactory due to distance or intervening terrain obstructions. At the same time, the petitions for rule making regarding translator matters now before us make this an appropriate time to reevaluate the existing rules for the authorization and operation of FM translators. In particular, we want to examine the existing regulatory structure to determine if it provides the best means for the implementation of our policy goals. On the one hand, we seek to consider whether the existing regulatory scheme, or another providing more stringent regulation, would best serve to ensure the availability of the optimal amount of quality radio service to the public. Alternatively, we believe that some expanded uses of FM translators might be consistent with the supplementary role of the service and should be examined more closely to determine whether they would benefit the public.

7. After review of the comments submitted in response to the *NOI* and our own analysis of translator matters, we tentatively conclude that our existing regulatory structure no longer satisfies the intended purposes of the FM translator service. We find that there is a need to clarify and tighten several rules in order to ensure that FM radio broadcast stations are not adversely impacted by translator operations. We also have determined that several of our rules can be modified in order to better serve the public. Because of the complexity of this undertaking, this *Notice* examines each of the existing FM translator rules and policies separately. Below we describe the current rule or policy, summarize the comments received in response to the *NOI* and set forth our proposal to retain, to modify or to eliminate the current rule.[12]

8. We believe that the rules proposed here will establish a regulatory framework consistent with our commitment to provide FM radio service through FM radio broadcast stations supplemented by a translator service. We believe that adoption of the proposals discussed below will facilitate the delivery of improved radio service to the public through the use of FM translators. Parties are requested to consider each of our proposals. We also intend to consider alternative proposals submitted by commenters. Following our analysis of the comments received in response to this *Notice*, we will adopt those rules that will best serve the public interest.

SERVICE ISSUES

Ownership restrictions

9. In authorizing FM translators initially, the Commission was concerned about the potentially adverse impact this service could have if FM radio broadcast stations expand their service areas into other stations' service areas.[13] Therefore, the Commission adopted rules restricting the ownership of commercial FM translators by the FM radio broadcast station being rebroadcast. A licensee of a commercial FM radio broadcast station is prohibited from owning and operating FM translators which intend to provide service beyond its predicted 1 mV/m contour, if such service is within the predicted 1 mV/m contour of another commercial FM station licensed to a different community.[14] This means that a commercial FM station licensee may own and operate FM translators serving areas within its own predicted 1 mV/m contour for the purpose of filling in signal reception where its signal is impeded by geographic obstruction. In addition, commercial FM radio broadcast stations may become licensees of translators to serve areas beyond their 1 mV/m contour where there is no other predicted FM service.[15]

10. The licensee of an educational (NCE) FM radio broadcast station is not subject to any restrictions regarding the service area of any translators it owns and operates, if the signal is transmitted over-the-air from the primary station to its translators. A recent Commission action amended the signal delivery rules for commonly owned and operated NCE FM translators assigned to the reserved frequency band (channels 200-220) to permit the use of alternative signal distribution technologies. In such cases, an applicant for a translator proposing to serve a particular area is required to meet certain conditions before its application can be accepted.[16]

11. Independent parties are also eligible to become FM translator licensees for stations that are intended to rebroadcast either commercial or NCE FM stations.[17] Under existing rules, there are no restrictions on the ownership of FM translators by independent parties since their interest in establishing such translators is indicative of a need for supplemental FM service.[18] Thus, independent parties may be licensed to operate FM translators providing service to areas within or outside the 1 mV/m contour of the FM radio broadcast station being rebroadcast.

12. In the *NOI*, we sought comment on the need to modify the restrictions on ownership by an FM radio broadcast station of a translator providing service to the 1 mV/m area of another FM radio broadcast station. We asked commenters to provide information regarding the extent to which translators licensed under the current rules may be operating beyond their intended role as providers of service to areas where reception is unsatisfactory due to distance or intervening terrain obstructions. As a related matter, we requested comment on NAB's proposal to tighten the ownership rules to prohibit *any* use of translators that would extend a primary station's signal into the coverage area of another FM radio broadcast station, and asked commenters to provide information on the extent to which translators operating under the current rules might be providing needed service.

13. *Comments*. Commenters representing broadcast interests generally support NAB's proposal to limit FM radio broadcast station ownership of translators to providing fill-in service within the station's authorized protected contour.[19] These parties also state that only community groups should be permitted to own translators in unserved areas. Furthermore, NAB suggests that an FM radio broadcast station can use booster stations if it wishes to provide fill-in service to areas unable to receive its signal, due to terrain or other obstructions within its contour.[20]

14. Other commenters support further restrictions on translator ownership by independent parties. NAB proposes limiting independent party translator ownership to cases in which the translator would provide service to areas not within the 1 mV/m contour of any existing commercial FM radio broadcast station. Furthermore, NPR contends that the Commission should require independent party translator applicants (*i.e.*, those owners other than the licensee of the FM radio broadcast station rebroadcast on the translator) to demonstrate a nexus to the community to be served by the translator. It asserts that this requirement would be consistent with the Commission's original intent to limit translator ownership to the primary station, local citizens, or "qualified organizations representing the inhabitants of the translator's service area." *Notice of Proposed Rule Making*, "Operation of Low-Power FM Broadcast Translator and Booster Stations," 34 FR 761, 762 (Jan. 17, 1969).

15. Other parties support a rule change authorizing FM radio broadcast stations and independent parties to own translators without restriction.[21] They comment that the marketplace should determine the location and ownership of FM translators in order to maximize the availability of programming. Further, La Tour observes that there have been no adverse effects on NCE FM stations in the absence of ownership restrictions for NCE FM translators.

16. Several commenters recommend that the Commission include a definition of "underserved" in the rules. NAB suggests defining underserved areas as those not within the 1 mV/m contour of any existing commercial FM station.[22] Tucson Broadcasters Association (TBA) suggests that the definition of "underserved" could be based upon a ratio between the population and the number of available signals in the area, *e.g.*, the number of stations on the air and the total number of allocations for the area. Byron W. St. Clair (St. Clair) would define "underserved" as any area with less than six commercial 0.5 mV/m signals.

17. *Proposal*. We propose to classify FM translators into two categories.[23] The first category includes FM translators providing "fill-in" service -- *i.e.*, the FM translator's predicted 1 mV/m contour is within the protected contour of the primary station. The protected contour of the primary station shall be defined as the predicted 0.5 mV/m contour for commercial Class B FM stations, the predicted 0.7 mV/m contour for commercial Class B1 FM stations, and the predicted 1 mV/m contour for all other classes of FM stations. The second category includes FM translators providing service to "other areas" -- *i.e.*, the FM translator's predicted 1 mV/m contour extends beyond the protected contour of the primary station.

18. With respect to translator ownership, we propose to modify the existing rule which provides that an authorization for a commercial FM translator which is intended to provide reception to places which are beyond the predicted 1 mV/m contour of the primary station and within the predicted 1 mV/m contour of another commercial FM station assigned to a different principal community will not be granted to a licensee of an FM radio station. Our proposed rule states that ownership of a commercial FM translator will not be available to the licensee of an FM radio broadcast station if the predicted 1 mV/m contour of the FM translator goes beyond the protected contour of the primary station.[24] Thus, we will continue to allow NCE FM translators to be owned by either FM radio broadcast station licensees or independent parties. Additionally, a commercial FM radio broadcast station will still be permitted to own FM translators whose predicted 1 mV/m contours fall entirely within the primary station's protected contour. Such FM radio broadcast station owned translators are intended to provide fill-in service in areas that the station's signal cannot reach due to terrain obstructions. In this regard, we do not find it necessary to limit an FM radio broadcast station to the use of FM boosters, as suggested by NAB. We believe it is appropriate to allow the licensee the flexibility to determine whether its needs are best met through the use of translators or boosters. Further, we will continue to allow any independent party to apply for an FM translator authorization to serve any area. We request comment on the extent to which our proposed ownership rules are sufficient to prevent unintended uses of FM translators when considered in conjunction with our other proposals discussed below.

19. Consistent with the translator policies that have been in effect for the past two decades, we do not support NPR's proposal to impose additional restrictions on independent party ownership of translators since a relationship to the community to be served by the translator has never been a requirement for independent party ownership of translators.[25] Nor do we believe that independent party owned translators should be restricted to areas not

within the 1 mV/m contour of any existing commercial FM radio broadcast station, as suggested by NAB, since our rules permit independent parties discretion in the location of translators. Such restrictions could have a chilling effect on translator applicants, resulting in the diminution of service to the public. We believe that the interest of independent entities to establish such translators is indicative of a need for FM service. Thus, where technically feasible and within the parameters set forth in the other proposed rules, we believe such service should be authorized.

20. We are not persuaded, however, that it is desirable to allow commercial FM licensees to establish translators beyond their protected contours. While the establishment of independent party translators in these other locations appears to indicate a public desire for the programming, FM radio broadcast station owned translators would more likely indicate a station's interest in reaching audiences in areas that lie outside its service area. More generally, we also find that the proposal to eliminate restrictions on FM radio broadcast station ownership of translators conflicts with our belief that the public interest is best served by maximizing service through the use of FM radio broadcast stations. We continue to believe that the most appropriate and efficient means of providing additional FM service nationwide is by creating opportunities for the establishment and development of such stations. We believe that a modification of our rules to permit the expansion of FM service through the use of translators would be inconsistent with our basic FM allocations scheme. Such a change also would be particularly undesirable while we are implementing Docket No. 80-90 through the authorization of new stations in Docket No. 84-231,[26] because there might be interference between these new facilities and new translators.

Coverage area

21. The present rules do not contain a definition of an FM translator station's "coverage area." The rules, however, refer to the 1 mV/m field strength contour of the FM radio broadcast station being rebroadcast regardless of its class as the area within which a translator may provide fill-in service.[27]

22. In the *NOI*, we noted that other rules recognize that the protected contours of commercial Class B and Class B1 stations extend to their 0.5 and 0.7 mV/m predicted contours, respectively.[28] We asked commenters to consider whether to remove the 1 mV/m contour restriction entirely, or whether to authorize a 0.5 or a 0.7 mV/m contour to define both the area in which an FM radio broadcast station may build a translator and the area in which it is precluded from building a translator.

23. *Comments*. Greater Media recommends that the authorized service contour for primary stations should remain at 1 mV/m. NAB contends that the current 1 mV/m rule is unfair to Class B and B1 licensees because it permits translators in areas in which FM radio broadcast stations would not be permitted to operate. Therefore, NAB suggests that the rules regarding protected contours recognize the actual contours of Class B and B1 stations. TBA proposes revision of the 1 mV/m contour rule, contending that theoretical protection of the 1 mV/m contour may be insufficient to ensure that FM translators, a secondary service, protect FM radio broadcast station service, particularly in areas of the western United States where FM radio broadcast stations provide service beyond the 1 mV/m contour in the absence of interference and separations are greater than in the east.[29]

24. *Proposal*. We believe that, for purposes of the FM translator rules, a primary station's protected contour will be defined as the predicted 0.5 mV/m contour for commercial Class B FM stations, the 0.7 mV/m contour for commercial Class B1 FM stations, and the predicted 1 mV/m contour for all other classes of FM stations. We further believe that it is appropriate to define the coverage contour for an FM translator station. Although this matter was not specifically addressed in the *NOI*, a coverage contour definition will be useful in developing and interpreting our FM translator rules. We therefore propose to define the translator's coverage area as its predicted 1 mV/m contour, whether it is authorized for fill-in service or service to other areas. This will be the area within which an FM translator station can operate and is used for allocation and regulatory purposes, not to impose a minimum service obligation as suggested by NAB. Commenters are requested to address this proposal.

Financial support

25. The current rules provide certain restrictions on financial support of commercial FM translators by commercial FM radio broadcast stations. In particular, we do not grant authority to an independent party applicant who proposes to construct a new commercial FM translator station beyond a primary station's predicted 1 mV/m contour, and within the predicted 1 mV/m contour of another commercial FM broadcast station assigned to a different community if such independent party applicant will receive, directly or indirectly, any financial support or contribution from the primary station for application and construction costs, or any other costs incurred up to the time the translator commences operation.[30] However, a primary station licensee may support the operation and maintenance of such a translator after operations commence.[31] No similar restrictions apply to NCE FM licensees.

26. In the *NOI*, we sought comment on the need to modify the restrictions on support by a primary station of a translator operating within the service area of another FM radio broadcast station.[32] We noted that the current rules, restricting support of independent party owned translators by FM radio broadcast station licensees and limiting locally originated messages to those necessary to obtain and acknowledge contributions and advertiser support, were designed to prevent operation of translators as profit-making entities. In light of allegations by NAB and other commenters that translator operators are devising schemes to operate translators as profit-making ventures, we requested specific information on the nature of the purported ventures, the extent to which ambiguities in the current financial support rules subvert their intent and the extent to which translators operated for profit adversely affect the operation of FM radio broadcast stations. We also requested comment on NAB's proposal that we adopt rules to: (1) specifically prohibit profit-making by FM translators; and (2) prohibit primary stations from financially supporting any translators other than those providing fill-in service within their 1 mV/m contour.

27. *Comments*. Broadcast interests generally support NAB's proposal to prohibit third-party translator operators[33] from obtaining financial consideration from primary stations, either prior to or following construction of

the translator.[34] In support of its proposal to tighten the financial support rule, NAB argues that ambiguities in the current rule create incentives for translator operators to profit by accepting compensation, including maintenance fees, sale of advertising time (typically on a "barter" basis), or other types of payment, from the primary station.[35] In addition, KRXV claims that some primary stations attempt to circumvent the proscription against an FM radio broadcast station establishing a translator within the service area of another FM radio broadcast station by having an independent party apply for the license when, in fact, the independent party is either related to or has agreed to rebroadcast the FM radio broadcast station's signal for a fee or other compensation. La Tour, whose companies lease translators to FM radio broadcast stations for rebroadcast, maintains that there should not be limits on the economic compensation extended to a translator operator from the primary station and that translator service fees should be incorporated into the new rules. He argues that "lease back" agreements, where the primary station financially supports the translator, are in the public interest because they assure that translators will provide unique services.

28. *Proposal.* The existing financial support rule explicitly prohibits an operator of a commercial FM translator from recovering construction and application costs by collecting operation and maintenance support from the primary station in excess of actual expenditures. In this regard, a primary station's support of translators serving areas beyond its 1 mV/m contour is limited to the actual cost of operating and maintaining the translator and must not be large enough to reimburse the translator licensee for pre-operation expenses. Thus, the financial burden of establishing a new translator, or purchasing an existing one, is the sole responsibility of the applicant. However, NAB and others assert that such restrictions are difficult to enforce. Therefore, we are proposing to revise our financial support rule to make it easier to enforce and less subject to possible abuse.

29. Specifically, we propose to allow a primary station to support commercial translators providing fill-in service, both before and after the translator station commences operation, but to prohibit a primary station from supporting, directly or indirectly, any commercial FM translators providing service to other areas, both before and after they commence operation.[36] We believe the proposed revisions to our financial support rule should remove the ambiguities that have led to the abuses reported in the comments submitted by NAB and others. Commenters are asked to address our proposal. In addition, we solicit comment on the extent to which parties might still circumvent the proposed rule, through "under the table" reimbursements or any other forms of consideration not addressed by the proposed rule, and any specific clarifications that might discourage such activities.[37]

Fundraising by translators

30. The current rules provide that translators may originate one announcement per hour of up to 30 seconds, to solicit or acknowledge financial contributions made to defray the costs of installing, operating and maintaining the translator station.[38] Such announcements are to be made principally for the purpose of acknowledging financial contributions and may include identification of the contributors, the size or nature of the contributions and advertising messages of contributors.[39] The licensee of the translator may not make these announcements "for the purpose of making a profit."[40] We also wish to make clear that the same restrictions which apply to solicitations by and contributions to noncommercial FM stations are also applicable to noncommercial FM translators.[41]

31. In the *NOI*, we stated that the current rules limiting locally originated messages to obtain contributions and advertiser support were designed to prevent use of translators for economic profit. We sought comment on NAB's proposal that we adopt rules allowing only *bona fide* community-sponsored translators to originate messages regarding contributions toward station operation and maintenance, and that we specifically prohibit profit-making on such translators.

32. *Comments.* Broadcast commenters contend that the existing rules authorize independent party owned translators to originate messages, on a non-profit basis, to obtain and acknowledge contributions. While these commenters do not object to limited financial acknowledgments on community-owned and operated translators to offset legitimate operating costs, they urge that the sale of commercial time on translators for profit be explicitly prohibited.[42] NPR suggests that the lack of an explicit requirement that an individual or organization represent the needs of the community served by the translator has resulted in situations where translators are operated by individuals who "market" the translator operation for profit. Other commenters believe that community-owned and third party owned translators should be permitted to broadcast commercials for profit on an unlimited basis.[43] They believe that for-profit use of translators will foster the service, as well as allow advertising tailored to a small area served by small businesses.

33. *Proposal.* We propose to retain the existing rule allowing a total of 30 seconds per hour to solicit contributions or to acknowledge contributions. We also propose to clarify the rule to permit announcements for solicitation or acknowledgment of contributions to be split during the hour. Finally, we ask commenters whether our proposed rules concerning fundraising by fill-in and other area translators should be clarified by the inclusion of a definition of what constitutes acceptable solicitations and acknowledgements.

Local program origination authority

34. The current rules limit FM translators to rebroadcasting the signal of an FM radio broadcast station.[44] Program origination by all translators, commercial and NCE, is prohibited with the exception of origination authority to acknowledge or solicit financial support and to provide emergency warnings of imminent danger.[45] Moreover, emergency transmissions are limited in time and frequency to that necessary to protect life and property. Furthermore, where the translator is owned by an independent party, written consent is required for the rebroadcast of the FM radio broadcast station's signal.[46]

35. As stated in the *NOI*, our primary goal in this proceeding is to consider regulatory devices that will both promote translator use to provide service to areas in which direct reception is unsatisfactory due to distance or intervening terrain obstructions and to prevent translator operations from adversely affecting FM radio broadcast stations. Several parties submitted petitions for rule making proposing various forms of program origination authority for FM translators.[47] We noted at the outset that our desire to retain consistency among our overall FM

translator policies mandates that we proceed with caution in contemplating possible expansion of the basic service authorization for FM translators. We are aware of the concerns expressed by NAB and others that expanded operation of FM translators might deleteriously impact FM radio broadcast stations. In addition, we are cognizant that the processing of a large number of FM translator applications could unduly burden the Commission's resources. Moreover, wholesale expansion of FM translator authority could pose significant and difficult new monitoring and enforcement obstacles.

36. For these reasons, we tentatively concluded in the *NOI* that translator operations should not be altered substantially. Nevertheless, we stated our willingness to consider the possibility that, in limited circumstances, expanded use of translator operations to include program origination might offer benefits to the public. We therefore requested comments on the value, need and desirability of expanding FM translator authority to permit increased program origination. Since the expected location of such translators would affect listeners' options as well as competing FM radio broadcast stations, we requested comments on the anticipated location of such new translators. We also requested information on the extent to which the service provided by FM radio broadcast stations might not meet the public's needs and how expanded translator program origination might further the public interest in this regard.

37. In evaluating the proposals for expanded program origination authority, we noted that any action we might ultimately take could be expected to affect our resources and administrative procedures for licensing and enforcement. Therefore, we specifically requested that parties weigh the implementation considerations and the administrative costs of their proposals, and their possible effects on other programs.

38. *Comments*. The issue of whether the Commission should allow FM translators the authority to originate programming generated much controversy among commenters. NAB and other broadcast interests object to any proposed changes in the translator rules that might result in the creation of a low power FM service, stressing that translators' proper role is to operate as a supplementary and fill-in service for FM radio broadcast stations and not as a low power origination service.[48] NAB notes that the Commission's Docket No. 80-90 has phased in introduction of over 700 new FM radio broadcast stations in individual communities and adopted revised allotments to accommodate hundreds of other new FM radio broadcast stations to provide service to many previously underserved or unserved areas. Moreover, NAB adds, the Commission is considering initiating a rule making proceeding to expand the AM radio services for listeners in local communities.[49] NAB asserts that creation of a low power FM service, and the introduction of hundreds of new low power FM operations, would be antithetical to the current efforts to revitalize AM radio. ABES contends that proposals for low power FM service are inefficient, would adversely impact the ability of FM radio broadcast stations to use FM translator facilities to broadcast within their service areas, and would impede implementation of the Table of FM Channel Assignments.

39. The Federal Trade Commission (FTC) suggests that employing translators for program origination has the potential to benefit consumers. The FTC states that an increase in the number of listening options -- in this case translator program origination -- may increase consumer satisfaction by increasing the number of formats, the within-format variety, and the quality of the programming. To support this contention, the FTC submits a statistical analysis relating the daily average percentage of the population listening to radio to (among other things) the number of formats in various markets. The analysis concludes that an increase in the number of stations has a statistically significant effect on increasing the number of formats and that an increase in the number of formats has a statistically significant effect on increasing the percentage of the population listening to radio.[50]

40. In response to FTC's study, the NAB submitted a study of radio listening behavior, which concludes that there is no need for translators with origination authority. It contends that the vast majority of the public has plenty of radio options. To illustrate this point, NAB's study delineates a range of counties, by population size, showing the average number of radio stations available in each type of county.[51] NAB's study shows that in the smallest counties (those with populations of less than 1,000 people age 12 and older) an average of 10.5 different radio stations register listening audience as reported by diary keepers. In the largest counties (populations exceeding 500,000) the average is in excess of 80 stations. For the entire country, a radio listener has access to, on average, 26 radio stations. NAB also submits a list of recent translator applications purporting to show that the general focus of translator applicants is to provide service to already well-served areas with significant populations not in those areas for which the translator service was initially developed.

41. Other commenters supporting program origination authority for FM translator service contend that authorizing "narrowcasting" on translators would allow translator operators the ability to provide specialized program formats not available from FM radio broadcast stations.[52] They state that, because translators can be operated at lower cost than FM radio broadcast stations, areas not presently served by existing FM radio broadcast stations would have access to locally originated programming that would increase the diversity of program services available to the public.[53] Some programming origination proponents seek authority to operate without geographical, market or profit restrictions.[54]

42. Turro, another proponent of translator program origination, proposes that FM translators be licensed to provide local origination "narrowcasting" only if they are located in a region with no existing or allocable local commercial transmitting FM service and if the licensee can demonstrate that local service will not be preempted by a Docket No. 80-90 facility or existing FM stations under the current rules.[55] Turro also proposes that such translators should be subject to all Commission rules, regulations and policies applicable to FM radio broadcast stations so that no new or special regulatory standards need to be developed for this extension of translator service. Turro suggests that limited expansion of FM translator origination authority in these circumstances would enable areas without local service to have access to FM programming with little impact on FM radio broadcast stations licensed to distant communities.

43. NAB replies that few proponents of FM program origination authority propose to locate translators in truly unserved areas. Rather, it argues, these parties seek authority to initiate low power FM service in large to me-

dium sized markets where the potential to attract advertising revenues away from FM radio broadcast stations is high and the potential to jeopardize the financial viability of FM radio broadcast stations is strong. NAB also cautions that expansion of the FM translator service beyond its original function would unduly burden the Commission's limited administrative resources by resulting in a flood of applications from parties seeking program origination authority and requests for more power to accommodate a change in operational status from rebroadcasting to origination. Other commenting broadcasters agree with NAB that the appropriate method of ensuring local programming in areas where there may be a need for additional broadcast service is through establishment of additional FM radio broadcast stations.[56]

44. *Proposal.* We propose to retain the existing prohibition against program origination authority for translators. We maintain that the proper role of FM translators in our FM allocations scheme is to provide secondary service to areas in which direct reception of signals is unsatisfactory due to distance or intervening terrain obstructions. We are committed to maximizing service to the public with efficient spectrum use and management. In view of our commitment to provide FM radio broadcast service in the most spectrally efficient manner possible, we believe it is desirable to hold constant the existing relationships in our FM allocations scheme and, thus, to maintain FM radio broadcast stations and translators in their current role as providers of primary and secondary service, respectively.

45. We are not convinced that FM translators should be given program origination authority. Where there is sufficient community interest, the rules which permit translators to rebroadcast the programming of FM radio broadcast stations provide an opportunity to import programming formats that are not otherwise available. We believe that, in these areas, to allow low cost translators to operate substantially like FM radio broadcast stations, without subjecting the translators to the same requirements that are imposed on FM radio broadcast stations, would undermine our goal of encouraging FM radio broadcast facilities to the extent possible. Furthermore, while imposing these requirements would vitiate our concern regarding unequal treatment, we note that such an action would effectively re-create low-power Class D noncommercial stations.[57] The Commission determined in 1978 that the operation of these limited-range (10 watt) stations could create substantial spectrum inefficiencies if they operated on a primary basis. The large number of limited-range Class D stations then operating were impeding licensing of more efficient Class B and C stations. Specifically, the Commission observed that FM radio broadcast stations make more efficient use of the spectrum than low power stations because the ratio of coverage to interference area is much larger for higher power FM radio broadcast stations. Therefore, to now propose to amend the rules in a manner that would encourage translator or low power operation would be counter-productive.[58]

46. We wish to underscore that we do not intend to modify the existing requirement that an independent-party owned translator, providing fill-in service or service to other areas, must obtain the permission of the FM radio broadcast station to rebroadcast its programming.

Local service obligations

47. Under the current rules, FM translators have no local service obligations. We noted this fact in the *NOI*, although commenters were not specifically asked to consider whether local service obligations would be appropriate for FM translators.

48. *Comments.* Several broadcast commenters address this issue in their comments. Specifically, some of these parties object to granting translator operators program origination authority since translators are not subject to the same local service obligations that FM radio broadcast stations bear.[59] Alternatively, CBS contends that, if translators are granted program origination authority, they should be subject to the same public service obligations imposed on FM radio broadcast stations. NAB favors the adoption of minimum coverage requirements of the community of license and recommends that the 3.16 mV/m contour of the translator cover the entire limits of the community. NAB believes that its proposal would avoid cases in which translators licensed to particular communities provide high powered coverage to larger, more populated areas, rather than coverage to the licensed communities.

49. *Proposal.* We continue to believe that FM translators should be exempt from local service obligations in all areas. We believe that imposing local service obligations on translators would exact a cost on their operations that could jeopardize their existence, contrary to our goal of extending service to the public. We seek comment on our proposal to continue to exempt FM translators from all local public service obligations. Commenters should also balance the costs incurred in meeting any public service obligations against the secondary nature of translators.

Signal delivery

50. The current rule generally provides that translators may only rebroadcast the signal of an FM radio broadcast station or another translator that is received directly over-the-air.[60] The only exception is that an NCE FM translator station operating on a reserved channel, and owned and operated by the licensee of the primary station, may use alternative signal delivery means, including, but not limited to, satellite and microwave facilities under certain conditions.[61]

51. In the *NOI*, we asked whether we should authorize commercial FM translators to rebroadcast distant signals delivered by any technical method, including microwave and satellite facilities. There we observed that the current rules limit commercial FM translator reception to the line-of-sight of their primary station and may have the unintended effect of restricting the use of translators even within the primary station's predicted service area because of terrain features. We noted that, if adequate public policy justification exists for restricting the distance over which a commercial translator may pick up a distant signal, we could consider the imposition of distance limitations on the translator location, but not restrict the technology used to bring the signal to the translator itself. We, therefore, requested comments on the current rule restricting signal delivery to commercial FM translators to over-the-air transmission, and requested comments on whether changing the rule was in the public interest.

52. *Comments.* Four commenters support the use of any signal delivery technology to the FM translator that the licensee deems suitable.[62] Specifically, La Tour argues that the use of alternative distribution technologies would provide reasonably priced delivery of a dependable input signal to the translator. Six commenters oppose the use of alternative signal delivery technology by commercial FM translators.[63] They reason that the use of microwave or satellite feeds would allow translators to operate far from the primary station's community of license. These parties contend that the importation of distant signals would erode the economic base of existing FM radio broadcast stations. London Bridge, in particular, argues that areas with no local community service should receive translator services from nearby communities to which their citizens turn for services that are only available in a large city. It adds that the over-the-air delivery rule acts as a natural barrier to prevent the establishment of regional translator networks. NAB, however, would only expand the permissible distribution technologies to include microwave delivery. NPR supports the use of alternative signal delivery technology for NCE FM stations with a limitation imposed on the distance between the primary station and the NCE FM translator.

53. *Proposal.* We propose to change the signal delivery rule limiting commercial FM translators to over-the-air signal delivery to permit FM translators providing fill-in service to use terrestrial microwave transmission facilities. We believe that this change will facilitate the rebroadcast of broadcast signals to remote or geographically inaccessible areas where over-the-air terrestrial retransmission has not been particularly effective. We seek comment on this proposal.

Use of auxiliary frequencies

54. Under existing rules, only NCE FM translators owned and operated by their primary station may use auxiliary broadcast frequencies for program reception.[64]

55. In the *NOI*, we sought comment on the possible authorization of certain broadcast auxiliary frequencies for the delivery of signals to commercial FM translators, if we were to permit the use of alternative signal distribution technologies.[65] We noted that these frequencies are congested in many areas, particularly the larger markets, and that use of intercity relays to deliver signals to translators could affect the availability of channels to serve FM radio broadcast stations. We also observed that broadcast auxiliary channels might be unused in the more remote areas served by FM translators. Thus, we suggested that such use might be acceptable if their use was secondary and frequency usage was coordinated with local frequency coordinating committees.

56. *Comments.* Most of the seven parties commenting on this issue would permit use of auxiliary broadcast frequencies on a secondary basis after clearance with local frequency coordinating committees.[66] However, a number of commenters would place additional restrictions on such use. NPR states that, in areas where the upper range of studio-to-transmitter links (STLs) and intercity relay links are not used to their full capacity, their use by translators might be possible under certain conditions.[67] It contends that use of these frequencies could result in greater spectrum efficiency and could provide a flexible and less costly means for delivering broadcast signals to translators. In order to ensure that auxiliary frequencies are only used by translators providing fill-in service or service to unserved areas, Greater Media proposes that use of these auxiliary frequencies be restricted to FM radio broadcast station owned translators within specified geographic limits.[68] Lotus finds any secondary use of broadcast auxiliary channels, other than for the delivery of programming to translators which are licensed to an FM radio broadcast station, unacceptable because the amount of spectrum is extremely limited. CBS believes that translators' use of auxiliary frequencies should be limited to the 950 MHz STL band because other auxiliary frequency bands are too congested for translator use and interference would be likely. NAB objects to all use of auxiliary broadcast frequencies, even on a secondary basis, arguing that these frequencies are overly congested and should be used only by FM radio broadcast stations.

57. *Proposal.* We propose to authorize commercial FM translators in fill-in areas to use aural broadcast auxiliary frequencies (intercity relay stations) on a secondary basis.[69] We also propose to condition the use of these frequencies on advance coordination with local frequency coordinating committees, or local broadcast users in the absence of a coordinating committee. Specifically, we propose to modify our rules to: 1) expand the use of aural broadcast intercity relay stations to include their availability for the transmission of program materials between an FM radio broadcast station and its translators; 2) authorize the transmission of program material between FM radio broadcast stations and the FM translator facilities; and 3) amend the licensing procedures to accommodate such usage.

58. We believe that this proposed use of auxiliary frequencies, with the specified limitations, is consistent with our objective to authorize translators as a supplemental service to that of FM radio broadcast stations. Notwithstanding arguments raised by some parties that these frequencies are congested in many areas, it is at least likely that broadcast auxiliary channel space is available in more remote areas, where translators are needed most. Therefore, the authorization of auxiliary frequencies in these areas would be in the public interest because it would maximize the potential for service. However, the secondary nature of this proposed authorization would minimize the impact on the availability of broadcast auxiliary frequencies in those areas where congestion may already exist. We request commenters to consider this proposal for the use of broadcast auxiliary frequencies to transmit programming to FM translators.

Conditional relaying

59. The current rules permit FM translators to retransmit the signals of another FM translator. However, translators may not be used solely as a means for relaying the signal of the primary station to a more distant facility.[70] The rules also state that each FM translator is intended to provide direct reception to the public and any other use is incidental.

60. In the *NOI* we asked for information on the extent to which translators are being used solely to relay signals to another translator in a distant community served by one or more FM radio broadcast stations. Additionally, parties were asked to consider NAB's proposal that we adopt community standards and minimum signal strength requirements for community coverage to ensure that translators serve populated areas.

61. *Comments.* Broadcast interests argue that translators should be prohibited where they are used solely or primarily to deliver a signal to another translator in order to permit a primary station to expand its geographic coverage.[71] Greater Pacific contends that the use of translators as relays threatens the economic viability of small to medium market FM radio broadcast stations. It therefore supports NAB's proposal to prevent the use of translators solely as relays by requiring that translators provide minimum signal coverage to a single community. KRXV claims that some existing translators are located in "ghost towns," "unpopulated railroad sidings," and areas with "no current residents" in a manner that permits primary stations to expand their coverage to distant locations. It recommends that translator applicants be required to demonstrate that each proposed translator serves a *bona fide* community. Robert Jones recommends canceling licenses where translators are used as relays. He contends that since the present rules require translators to be licensed to a community or area, it would be easy to detect "relay" only filings. In contrast, St. Clair recommends licensing of FM translator relays on a third priority basis similar to the licensing of TV translator relays under Part 74, Subpart F.

62. *Proposal.* We find that the current rules on conditional relaying for translators should be retained. These rules proscribe establishment of a translator solely for the purpose of relaying the signals of the primary station to a more distant facility, but do not prohibit such uses on an incidental basis. We continue to believe that translators should not be used solely as relay devices. However, we are also concerned that strict population or community criteria would inhibit the establishment of translators bringing service to remote areas, to the detriment of those most in need of the service. Accordingly, we will not set forth a strict rule defining the size of populations meriting translator service. Moreover, we believe that our proposed financial support and ownership rules will allay some of the objections raised by the parties to translator relay networks established by FM radio broadcast stations seeking to expand their broadcasts into small or medium markets. Under our proposed rules, an FM radio broadcast station would not be able to own, operate or support FM translators in areas outside its protected contour. Translators serving those areas must be operated by independent parties without any financial contribution from the primary station. Therefore, we believe that our proposals to revise other rules will effectively prevent the establishment of translator relays when their principal purpose would be to extend the geographic coverage of primary stations into other areas already served by AM or FM radio broadcast stations. We seek comment on whether our proposal to retain the existing rules on conditional relaying in conjunction with our proposed ownership and financial support rules would be sufficient to deter the establishment of such translator relay stations.

Need requirements for translators

63. Section 74.1232(b) states that an applicant may be licensed to operate more than one FM translator, even if such translators serve substantially the same area, upon an appropriate showing of need for the additional stations.[72] The rule does not contain specific guidelines regarding the showing necessary to justify grant of a translator application, or regarding the burden of proof necessary to demonstrate lack of need.

64. Under our current standard, the need for a translator is presumed upon the filing of the application. Only if a *prima facie* showing of lack of need is made, or if an applicant is seeking more than one FM translator to rebroadcast the same FM radio broadcast station, do we require the applicant to document a need for the proposed new FM translator stations. In the *NOI*, we noted that certain parties have urged us to shift the burden of proof to the applicant to demonstrate the need for the new service. They further recommend that we adopt guidelines for establishing a need for the new service. Thus, we sought comment on the appropriate burden of proof to be allocated among the applicants in translator proceedings. Commenters were requested to consider whether applicants should be required to establish a standard for need for the proposed translator service. Parties also were asked to comment on the criteria for an applicant's showing of need for such service and the criteria for an objector to show a *prima facie* lack of need.

65. *Comments.* Seven broadcasters commented on this issue. NAB suggests that, in order to limit translator service to unserved areas, the translator applicant should bear the burden to demonstrate the need for the facility. It notes that where the area is currently unserved, the burden would be low. NPR recommends that the burden of proof should vary with the circumstances. NPR asserts that the need for a translator should be presumed in the case of an applicant seeking authority to provide fill-in service. In that instance, the burden should shift to the opponent of the translator application to demonstrate lack of need. Where the applicant is an FM radio broadcast station or an independent party applying for authority to operate a translator outside the primary station's 1 mV/m contour, NPR believes that the burden of proof should fall on the applicant. CBS recommends that, to avoid determining whether an area is underserved or could support more stations, the burden of proof should be placed on the party proposing new translator service. However, CBS urges the rejection of any showings based on program format issues. Greater Media, KAB and KASI argue that need should be presumed when a translator applicant proposes to provide fill-in service or new service to wholly unserved areas.

66. *Proposal.* We propose to revise Section 74.1232(b) of the rules to clarify that "need" refers solely to the quality of the signal received (*i.e.*, technical necessity) and that programming content, format, or transmission needs of an area will not be considered in our determinations. We propose to apply similar standards to translators providing fill-in service, as well as to translators providing service to other areas. We also propose to clarify that in order for a primary station to demonstrate the need to own a second translator within its protected contour, it must only show that a technical necessity exists for the additional translator. We believe that removing any issues of programming from translator applications will eliminate unnecessarily subjective deliberative criteria from the application process. Conditioning "need" solely on technical criteria will clarify the information required for translator applications, expedite the processing of those applications and facilitate the delivery of higher quality broadcast signals to the public. Commenters are asked to address these proposals.

Method for selecting among applicants

67. Our existing procedure for selecting among mutually exclusive competing applicants for translator authority relies upon voluntary mutual agreement among the applicants.

68. In the *NOI*, we indicated an intent to reexamine our method for deciding between mutually exclusive applications for FM translator stations. We stated that, in our opinion, the comparative hearing process now being used for TV, AM, and FM radio applications would not be cost effective for resolving conflicts between FM translator applicants. Therefore, we suggested that it might be more appropriate to use an alternative approach, such as a lottery authorized by Section 309(i) of the Communications Act of 1934, as amended.[73] We also discussed the feasibility of awarding preferences to primary station applicants seeking to provide fill-in service. Finally, we requested comment on possible approaches for resolving mutually exclusive FM translator applications.

69. *Comments*. Five commenters address the lottery proposal raised in the *NOI*. [74] TBA believes that lotteries are an effective method of selecting among mutually exclusive applications. It also supports the establishment of a priority for FM radio broadcast station applicants seeking to provide fill-in service, with a filing window enabling FM radio broadcast stations to submit applications. La Tour supports the use of lotteries, filing windows, the imposition of application limits during any one filing period, and grants on a first come, first served basis.

70. Four parties discuss mutually exclusive application procedures.[75] NAB and NPR favor retaining existing application procedures with the creation of a preference for FM radio broadcast stations applying for translator licenses to provide fill-in service and service to unserved areas. Seven Ranges Radio proposes that, in the case of mutually exclusive applications for the same class of station, the applicant proposing fill-in service would prevail. Additionally, it recommends that for applications involving different classes of stations, a preference be granted to an applicant proposing to relay the lower class station. In all other cases, Seven Ranges Radio suggests that the applicant whose translator is closest to the primary station should prevail. NTA supports the creation of a window period for filing applications, with a ceiling on the number of applications submitted, and a requirement that permittees construct all translator stations prior to filing any additional applications. It also contends that if a permittee fails to complete construction within the allotted period, the permittee should be required to surrender the permit to the Commission. NTA also would prohibit the lease or sale of a translator permit or license.

71. *Proposal*. In the *NOI*, we proposed to revise our procedure for selecting among mutually exclusive competing applicants for translator authority. We specifically proposed use of a lottery system as an efficient mechanism by which to select among numerous mutually exclusive applicants. However, we note that, as part of our comprehensive review of all translator regulations, we propose to eliminate the rules restricting FM translators to certain limited frequencies and to permit them to use all 80 channels (Channels 221-300) of the commercial FM frequency band.[76] We believe that if translators are permitted to operate anywhere in the commercial band, mutually exclusive applications will not arise with any frequency and thus, it is not necessary to use a lottery system to dispose of them. In the rare event that we are faced with mutually exclusive applications, we propose to stipulate different frequencies as necessary for the applicants. Applications for FM translator stations proposing to provide fill-in service of the commonly owned primary station will be given priority over all other applications. In those instances where there are no available frequencies to substitute for a mutually exclusive application, we propose to apply the priority classification specified in BC Docket No. 80-130, as appropriate, in selecting a winning applicant for the FM translator station.[77] We seek comment on our proposal.

Definition of major change

72. The rules define a major change for FM translator stations as any change in output frequency (output channel), or authorized principal community, or area of service.[78]

73. *Comments*. Although this issue was not raised in the *NOI*, TBA addresses this matter in its filing. It argues that the rules lack clarity with respect to what constitutes major and minor changes. This situation allows an applicant to propose a minor change which significantly increases its coverage area and which, in fact, should be classified as a major change under the rules. Therefore, TBA proposes that the rules more explicitly define major change. In this regard, it suggests that in addition to any change in frequency, a major modification should include: (1) any change in the community of license; (2) an increase by 50% of the population served; or (3) an expansion of the primary signal into the 1 mV/m contour of an existing FM radio broadcast station. TBA asserts that since translators have no community service obligations, defining minor modification with respect to authorized principal community or area of service lacks clarity. Finally, TBA contends that a translator should not be permitted to change its directionality if, by doing so, it would rebroadcast the primary station into a community which is not unserved or underserved.

74. *Proposal*. We propose to define "major change" as a proposed change of coverage area of more than ten percent of the previously authorized 1 mV/m contour,[79] or a change in frequency. A change in the authorized principal community will no longer be considered as a criteria. All other changes will be considered minor changes. We note that this proposal would apply to both fill-in and other classifications of translators under consideration.

75. We believe that the test we have outlined above is an effective method of defining "major" and "minor" changes for translator applications. While the proposal set forth by TBA has some merit, we believe it would impose a significant burden on applicants, requiring them to expend substantial financial resources on engineering and demographic studies that would not be necessary under our proposed definition of major change. We also believe that our proposal is an effective method of determining whether a translator applicant is proposing a major change. We request comment on our proposal, including whether the ten percent change in coverage area is too restrictive, and whether a reduction in coverage of more than ten percent should be considered a major change. Commenters may also want to consider whether standards are needed to clarify the manner in which the relevant coverage change should be measured.

Multiple ownership limits

76. Under existing rules, FM translators do not count against multiple ownership limits.[80]

77. *Comments*. Although this subject was not raised in the *NOI*, two broadcast commenters address this issue. NAB suggests that the Commission adopt a "cap" -- *i.e.*, place limits on the number and location of FM translators any party can operate. It suggests that the ownership limits for FM radio broadcast stations would provide an appropriate guideline for choosing the cap, although the restrictions on translators need not be precisely the same. CBS argues that if translators were to be authorized to originate programming, they should be subject to multiple ownership rules.

78. *Proposal*. We believe it is appropriate to continue to exclude the ownership of FM translators for purposes of the multiple ownership rules in all cases. We see no reason to apply multiple ownership limits on the number and location of translators a single party can own and/or operate, as NAB suggests. Translators are established where there is a need to supplement the service provided by FM radio broadcast stations, and NAB's proposed restrictions could impede the delivery of necessary service to the public. Moreover, since translators are authorized on a secondary basis, subject to displacement by FM radio broadcast stations, it does not appear reasonable to impose multiple ownership restrictions on them. Commenters are asked to address this proposal.

79. We also see no reason to subject translators to the radio "contour overlap" rule which prohibits the common ownership of two or more commercial radio stations in the same broadcast service in the same geographic area, *e.g.*, two AM or two FM stations whose 1 mV/m contours overlap.[81] We propose to exempt FM translators from this rule and seek comment on this issue. We believe that where an FM radio broadcast station establishes a translator within its predicted service area, or permits another entity to do so, it is presumed that reception of its signal is precluded in the area to be served by terrain obstructions. Thus, while there may be common ownership between the primary station and one translator in the same service area, there actually would not be service from more than one commonly-owned station to the same population.[82] Where a translator is located beyond the protected contour of its primary station, and within the service areas of other FM stations, common ownership between the primary and translator stations could not occur by definition.

Cross - service translating

80. The current rules preclude an FM translator from rebroadcasting the signal of any station other than that of an FM radio broadcast station or FM translator.[82]

81. In the *NOI*, we sought comment on NAB's proposal to permit FM translators to be used to rebroadcast the signals of AM stations. We noted that distinct technical differences between the AM and FM services militated against merely extending the current FM translator authorization to include the rebroadcast of AM signals. We observed that there may be cases where it would be desirable to permit AM stations to use FM translators to provide fill-in service. We also indicated that the use of FM translators by AM stations theoretically could resolve problems of nighttime reductions in service area experienced by many AM stations. However, we noted that there could be adverse effects on AM service if we were to authorize FM translators to deliver AM programming, including diversion of audience from the AM band.

82. Eleven commenters support NAB's proposal to allow FM translators to retransmit AM signals.[83] They find that cross-band transmission authority would improve the quality of AM signals and would particularly benefit those daytime AM stations whose nighttime coverage is significantly reduced and subject to interference. Three parties oppose the proposal. Greater Media rejects the proposed cross-band use of FM translators to rebroadcast AM signals and recommends use of synchronous AM transmitters for AM signal enhancement. Lotus and NewCity object to this proposal on the grounds that it is inconsistent with the Commission's overall objectives to improve AM service.

83. *Proposal*. We propose to retain the current rule precluding an FM translator from rebroadcasting AM signals. We have serious reservations that actual improvements in AM service could be gained by allowing FM translators to rebroadcast AM stations in fill-in and other areas. The ground wave propagation characteristics of AM signals are such that they normally do not leave service voids or "shadowing" -- *i.e.*, holes in coverage -- similar to the "shadowing" found in the FM band, although licensees may desire to supplement coverage in directional antenna nulls. Thus, there is generally no reason for AM licensees to establish fill-in service facilities on the FM band. Moreover, the Commission is conducting a comprehensive proceeding to improve the AM radio service and to enhance the ability of such stations to compete in the marketplace.[84] Thus, we believe that to approve the general use of FM translators by AM stations would contravene the goals of that action.

TECHNICAL ISSUES

Frequencies available to FM translators

84. The existing rules authorize commercial FM translators to use the 20 channels of the FM broadcast band formerly authorized for Class A stations. NCE FM translators may use these 20 channels plus the 20 channels reserved for noncommercial use (Channels 200-220).[85] In the *NOI*, we invited commenters to address the possible elimination of these restrictions to permit FM translators to use all 80 channels (Channels 221-300) of the commercial FM frequency band.

85. *Comments*. Eight commenters oppose amending the rules to allow commercial FM translators to operate on all 80 channels of the commercial band (Channels 221-300).[86] Greater Media states that the existing restriction is necessary to avoid possible interference to Class B and C stations. NBC agrees that restriction is necessary to avoid co-channel and adjacent channel interference. Twelve commenters support a rule change.[87] NewCity argues that use of all 80 channels should be restricted to translators licensed to FM radio broadcast stations in order to promote spectrum efficiency and interference protection. Temple supports the use of all 80 commercial channels, contending that there is a shortage of reserved band FM channels within Channel 6 television coverage areas.

86. *Proposal*. In the 1970 *Report and Order* in Docket No. 17159, *supra*, we limited commercial FM translators to the use of the 20 Class A channels. However, we left

open the option of revisiting this determination in a subsequent rule making proceeding should experience indicate that additional frequencies were needed.[88] Our experience now leads us to conclude that the demand for Class A channels exceeds the supply. We have already modified our rules to permit Class A FM broadcast stations to operate on all 80 channels of the commercial frequency band.[89] In addition, translator applicants currently must conduct expensive and generally inconclusive studies to demonstrate the unavailability of Class A channels.[90] Given the inconclusiveness of such studies and their costliness, we find this manner of proceeding highly inefficient. Consequently, we propose to allow FM translators to operate on all 80 non-reserved commercial channels. We do not concur with those commenters who contend that this action would create an interference problem since the secondary status of translators requires them to operate on a non-interference basis. We seek comment on this proposed expansion of the frequencies available for translator use. We also seek comment on ways to alleviate the expected impact that expanded channel availability will have on the time needed to dispose of applications tendered for filing and whether FM radio broadcast stations should be allowed to use first adjacent channels for fill-in translator service.

Maximum power output

87. Currently, power limits for FM translator operation are based on a transmitter power output (TPO) standard. FM translator stations located east of the Mississippi River or in Zone I-A (*i.e.*, California, south of the 40th parallel) are limited to a TPO of 1 watt. The maximum permissible TPO for FM translators located in all other areas (*i.e.*, west of the Mississippi and outside Zone I-A) is 10 watts.[91]

88. In the *NOI*, we requested commenters to address whether it might be desirable for the authorized power of FM translators to be uniform throughout the country. Parties were asked to consider the effect of increasing the authorized power for FM translators to 10 watts nationwide, and particularly whether translators operating at higher powers might cause increased interference to FM radio broadcast stations located east of the Mississippi River and in Zone I-A. We also requested comment on NAB's proposal to rely on the effective radiated power (ERP) of translators and/or antenna height above average terrain (HAAT) standards, rather than TPO, as a more effective means to prevent interference.

89. *Comments.* Broadcast interests generally support adoption of ERP and HAAT standards, but propose various limitations. NAB maintains that the current TPO limitations have proven inadequate to protect FM radio broadcast stations from translator interference. Therefore, it recommends that the Commission adopt maximum permissible ERP standards and HAAT limitations to make coverage and interference standards more effective. In this regard, NAB proposes a maximum permissible ERP of 10 watts for areas east of the Mississippi River and Zone 1-A and 75 watts for other areas. NAB also proposes a HAAT limitation of 30 meters (100 feet).[92] Greater Media recommends a 10 watt/100 watt permissible ERP limitation (for areas east and west of the Mississippi) and an HAAT of 100 meters. In response to Greater Media's proposal, NAB contends that its 10 watt/75 watt limitations would foster a more reasonable balance between the FM translator goals of adequate local coverage and interference avoidance. At the same time its 75 watt limit would minimize the costs for establishing translator service since less sophisticated antenna arrays are needed to achieve a 75 watt ERP rather than a 100 watt ERP.

90. TBA suggests that the Commission adopt a maximum ERP of 100 watts with an HAAT limit of 150 meters. NAB counters that an ERP limit of 100 watts (for areas that permit 10 watt TPOs) exceeds the power required to provide localized service and creates the risk of more interference than its 75-watts proposal. Scripps Howard recommends that a translator's ERP be limited to 50 watts if the HAAT exceeded 30 meters.[93] Seven Ranges Radio favors a maximum power standard that includes a nationwide power level of 10 watts TPO, but limits translators to 100 watts ERP at 30 meters HAAT. Alternatively, Lotus Broadcasting suggests that the 1 watt/10 watt geographic power standard be retained, but that ERP and HAAT also should be limited to 20 watts and 30 meters, respectively, with a requirement that power be reduced proportionately above that height.

91. Temple, which operates two FM translators with the existing restriction of 1 watt TPO, favors increasing TPOs to 10 watts per antenna nationwide. Temple asserts that an increase from 1 to 10 watts would conserve space at crowded transmitter sites, and that the adoption of prohibited overlap standards would protect FM radio broadcast service and other secondary services from potential harmful interference that could result from increasing the TPO to 10 watts. A number of nonbroadcast interests also support a nationwide 10 watt power limit.[94] In particular, St. Clair argues that a uniform 10 watt power level would be beneficial in the east for those areas that require increased power because of dense foliage, mountains and urban areas with high noise levels.

92. Turro proposes that FM translators should be allowed to use power levels up to 25 watts, provided that they do not interfere with any FM radio broadcast service facility. In reply, NAB argues that an increase of the permissible TPO *only*, whether or not measured at the antenna input port, would result in higher ERPs and would exacerbate actual and potential interference to FM radio broadcast stations. NAB recommends the adoption of more stringent technical standards as the only sound method of eliminating existing and potential interference.

93. Family Stations, on the other hand, urges the Commission not to adopt ERP and HAAT limitations, arguing that the existing rules provide adequate interference protection for FM translators and that the Commission only needs to clarify TPO limits. NAB disagrees that the existing rules give adequate protection to FM radio broadcast stations from translator interference. It urges that ERP and HAAT limitations be required to correct these inadequacies. La Tour disputes the need to restrict coverage through ERP and HAAT limitations. He asserts that he employs directional antennas to maximize the ERP of his translators and that any restrictions on the translator's radiated signal strength would be unreasonable.

94. *Proposal.* We propose to change our standards regarding translator maximum output power from TPO values to ERP values primarily because a known TPO does not yield a unique predicted contour. This is due to the impact of variables such as the type and length of transmission line and the gain of the antenna used, both of which affect the actual power radiated. Consequently, we have found that the actual power radiated can bear little relation to the TPO fed into the transmission system. As a result, FM translators can achieve vastly larger service

areas than were contemplated when the TPO standard was adopted.[95] On the other hand, for a given height a known ERP yields a unique contour which can be used to predict coverage and interference and thus provides superior evaluative criteria.

95. Accordingly, we propose to replace current TPO standards with limits on the maximum permissible ERP. We propose to adopt a 1 kW ERP limit subject to restrictions on the radius of the translator's coverage contour specified below. We recognize that the 1 kW value is greater than the ERP limits proposed in the comments but stress that it is an outside limit rather than a recommended usage level. Within the 1 kW limit, translator licensees will have flexibility to design specific ERP and HAAT combinations tailored to provide better coverage of the area they seek to serve. The restrictions imposed by the coverage contour radius, however, will ensure that translators retain their supplemental role.

96. We do not believe that any additional restrictions are needed for fill-in translators because our other proposals require the 1 mV/m contour of the translator to stay within the protected contour of the FM radio broadcast station being rebroadcast.[96] Within these parameters, a translator operator would have flexibility to determine the appropriate ERP and HAAT that would best serve its needs.[97]

97. We also propose to adopt a maximum power criterion of 1 kW ERP for translators serving other areas. However, we propose to subject such translators to the additional restriction that the distance from their transmitting antenna to their predicted 1 mV/m contour may not exceed 16 km (approximately 10 miles)[98] in any direction. We will require applicants to compute the antenna height above average terrain along each of 12 distinct radials, with each radial spaced 30 degrees apart. The bearing of the first radial shall be true north. Along each radial the ERP shall be such that the distance to the predicted 1 mV/m coverage contour does not exceed 16 kilometers. We believe that the use of 12 evenly spaced radials is sufficient to allow an applicant to demonstrate compliance with the power/distance limitations we are imposing. Therefore, we will not accept petitions or comments challenging an applicant's showing unless such challenge intends to demonstrate prohibited contour overlap or actual interference. By proposing a maximum coverage area for the transmitter signal, we believe that the ERP and HAAT of the antenna can be varied to achieve the intended service area of the translator in a predictable manner, thereby eliminating a number of problems inherent in the use of TPO. We further believe that our proposed ERP and distance limitations would allow translator applicants greater flexibility in designing systems that would result in a higher quality of service. For example, a translator operating with an ERP of 1 kW could utilize an antenna with an HAAT of 77 meters; a translator operating with 600 watts ERP could employ an antenna with an HAAT of 98 meters; a translator operating with 500 watts ERP could use an antenna with an HAAT of 107 meters; a translator operating with an ERP of 50 watts could utilize an antenna with an HAAT of 340 meters; and a translator operating with 10 watts ERP could utilize an antenna with an HAAT of 860 meters. We ask commenters to address our proposal to impose maximum power output standards, including the limits we suggest.

98. Since higher powered stations are more likely to contribute to significant human exposure to radiofrequency (RF) radiation,[99] the proposal to change to an ERP standard requires consideration of the potential environmental impact from RF radiation emitted by such stations. Accordingly, we propose to amend Section 1.1307(b) of the Commission's rules to require FM translator stations operating with more than 10 watts ERP to consider the potential impact of RF radiation on the environment.

Antennas

99. The existing rules for licensing of multiple and composite antennas and the various forms of polarization are imprecise.[100] With respect to multiple antennas, Section 74.1235(a)(2) specifies that they are permissible as long as their radiation fields do not combine. The current rules do not contain precise standards for circularly polarized and composite antennas.

100. We did not specifically solicit comment on the possibility of clarifying or revising our rules for multiple, circularly polarized and composite antennas in the *NOI*. However, we noted that because the existing rules only limit transmitter power output, licensees have considerable discretion regarding the use of antennas and other equipment.

101. *Comments*. With respect to this matter, Greater Media proposes retention of Section 74.1235(a)(2), which prohibits the combining of radiated fields from multiple antenna arrays. Greater Media asserts that a limit on power versus height is necessary to prevent potential abuses. It also states that applicants proposing greater antenna heights should be subject to ERP reductions proportionate to the antenna HAAT, similar to the methodology employed in the commercial FM service. Further, regarding antenna systems, Temple suggests that the Commission authorize circular polarization, which it contends is superior to single or "dual" polarization.

102. *Proposal*. We believe that our proposal to use an ERP standard to set maximum power limits should cure any ambiguity in our rules concerning the licensing of multiple antennas. The total radiated power in any direction from all antennas could not exceed the 1 kW/16 km limit, based on computations of antenna height above average terrain along each of 12 distinct radials, with each radial spaced 30 degrees apart. Similarly, with respect to composite antennas, the proposed ERP standard should simplify matters by giving translator operators discretion to use composite antennas as long as the radiated field in any direction falls within the requisite power/distance limit. With respect to dual or circularly polarized antennas, we propose that the ERP/distance limit apply equally to both the horizontally and vertically polarized components. We ask commenters to address these issues.

Standards for directional antennas

103. The current rules do not specifically address the use of directional antennas by FM translators, and therefore do not include standards.[101] In the *NOI*, we requested comment regarding the possible imposition of such standards.

104. *Comments*. Broadcast commenters support the use of directional antennas as a means of reducing interference by FM translators to FM radio broadcast stations. VAB and NCAB claim that adoption of ERP levels and more precise control of the use of directional antennas, including a contour overlap standard or distance standard similar to those developed for FM radio broadcast stations, are necessary to protect against interference. Temple advocates use of directional antennas to promote efficient use of the FM spectrum and notes that such antennas allow FM translators to be situated where non-directional antennas would cause interference to FM radio broadcast stations. TBA states that the absence of technical standards for antenna height and power, as well as directionality, allows excessive power usage by FM translators. TBA recommends that the Commission require directional antennas to provide contour protection to avoid interference.

105. *Proposal*. We propose to codify the use of directional antennas by FM translator stations and to impose standards for such use. As we found in our decision in MM Docket No. 87-121,[102] the technical characteristics of directional FM antennas permit licensees to short-space their transmitters, while at the same time providing full interference protection to the service of other co-channel and adjacent channel licensees. We believe that directional antennas also provide applicants with additional flexibility in antenna site selection for the translator service. The contour protection they give is a valuable alternative to the proposed distance separation requirements because directional antennas provide predictable levels of signal attenuation in specific directions. We further propose that applicants seeking to use directional antennas for translator service include information as specified in Section 73.316 of the rules as part of their applications demonstrating conformance with the rules. We will also require the applicant to address the impact of its proposal on nearby existing or proposed AM, FM and TV broadcast antennas. We ask commenters to address these proposals and to consider whether some other standard should be adopted.

Interference criteria

106. FM translators are a "secondary" service and, as such, are authorized subject to the condition that they cause no interference to the direct reception by the public of the off-the-air signal of any authorized FM radio broadcast station.[103] The rules distinguish between predicted and actual interference. Predicted interference is the predicate for determining whether an application should be granted and is currently based on the contour overlap tables of Section 73.509 of the Commission's rules. Actual interference is the result of on-the-air experience and is the basis for determining whether an authorized FM translator station can remain in operation. Translator operators are responsible for correcting any interference caused by their signals. Otherwise they must suspend operation until such interference can be eliminated.

107. In the *NOI*, we recognized the concern among many FM broadcasters that the current rule may be inadequate to prohibit FM translators from causing interference to FM radio broadcast stations.[104] While standards that would absolutely preclude any measurable received interference by translators to FM radio broadcast stations would be impractical, we recognized that standards more stringent than those currently in place might provide additional protection without unduly restricting translator operations. We thus requested comment on several alternative approaches for improved interference protection. First, we inquired whether the adoption of distance separation standards for FM translators and co-channel and/or adjacent channel translators and FM radio broadcast stations would provide adequate protection.[105] These standards would be comparable to those specified for minimum distances between FM radio broadcast stations. A second means of interference protection would be to prohibit overlap of signal strength contours, as we have done for noncommercial educational FM stations.[106]

108. We further acknowledged, in the *NOI*, that whatever technical interference standards we may adopt, there may be cases where translator-to-translator interference

occurs. We asked whether we should establish a policy to govern interference between translators, even though the translators are otherwise in conformance with the rules. In this regard, we asked commenters to address whether it was appropriate to adopt a policy that acknowledges that a certain degree of actual interference might be unavoidable even if translators meet our technical allocation standards. We emphasized that such provisions would apply *only* to interference from a translator to a translator or from a translator to another secondary service, and not to interference by translators to FM radio broadcast stations or vice versa.

109. *Comments*. Nine commenters favor use of the prohibited overlap interference protection standards used for NCE FM stations set forth in Section 73.509 of the rules.[107] TBA, Temple and H&E comment that determining FM translator allocations on the basis of prohibited contour overlap is superior to basing interference protection on distance separation because it permits the use of directional antennas to achieve protection. NAB, in contrast, supports retention of existing Section 74.1203(b) and the use of minimum distance separations based on an FM radio broadcast station's protected contour to determine the area to be protected from the interfering contour of the translator. NPR and Temple suggest that the Commission adopt interference calculations based on those used by the television translator service.[108] NAB opposes Temple's suggestion, arguing that there is no justification for FM translators to have the same degree of interference-free coverage as FM radio broadcast stations. NAB concludes that should such coverage need be established the better course would be to license an FM radio broadcast service facility.

110. Regarding standards for translator-to-translator interference protection, Greater Media supports the Commission's proposal to require translator licensees to accept mutual interference which may arise when such translators are otherwise in compliance with any new interference standards adopted. It asserts that licensees should be required to cooperate in the resolution of interference, and only rely upon Commission intervention as a last resort. Temple contends that translators, because of their secondary status, should be allowed to receive interference protection from existing translators at the option of the translator applicant. It further states that once the FM translator station is operative, it should be permitted interference protection from any new secondary service. La Tour argues that existing translators should have rights of protection against other new translators.

111. *Proposal*. For FM translators, we propose to adopt Section 73.509 as the means to define predicted interference, with the exception that commercial Class B and B1 stations will be protected to their predicted 0.5 mV/m and 0.7 mV/m contours, respectively, as specified in Section 73.215 of the rules. Further, for cases of actual interference, we propose to distinguish between interference to the transmission of a signal and its reception by the listening public. For transmission purposes we will continue to impose an absolute prohibition on translator caused interference. For reception interference, we propose to adopt the "significant number of complaints" standard we have found effective in resolving cases of interference for FM boosters.[109] While preparing and processing applications involving contour protection are more complex than preparing and processing applications conforming to the distance separation requirements, we believe that the prohibited overlap standards are more appropriate for predicting interference from FM translators.[110] We observe that contour protection takes into account the variability of the terrain surrounding stations, whereas the separation requirements are based on average terrain and assume terrain uniformity in all compass directions. Since translators are likely to be located in areas where terrain irregularities affect the availability of radio signals, we believe this factor should be considered when predicting translator interference. However, we will allow an FM translator applicant to demonstrate that, despite predicted contour overlap, interference will still not occur due to such factors as absence of population in the overlap area or mountainous terrain. By the same token, we will not grant an authorization for a new translator station, where the translator signal is likely to interfere with the reception of a regularly received off-the-air existing service in an area beyond the predicted overlap.

112. We acknowledge that evaluating interference by considering only the effect of the translator facility may tend to understate actual interference levels because of the cumulative effect of FM radio broadcast and translator station signals. Radio signal propagation is a probabilistic phenomenon, however, and the precise amount of the cumulative effect will vary with the individual circumstances involved. In the vast majority of instances the cumulative interference effect will be negligible. While a precise accounting of the cumulative effect could be performed on each individual application, such analysis is complex and time-consuming. Since the cumulative effect will not increase interference substantially, we believe the best course is to not take it into account for purposes of application preparation and processing. We also believe that the existing translator interference protection standards are sufficient for resolving any interference problems that arise. Because translators are secondary to FM radio broadcast service operations, in those rare instances where harmful interference occurs, it will be the translator operator's responsibility to resolve the problem. Harmful interference would be deemed to have occurred where the Commission receives a significant number of complaints.

113. In general, we have not found that interference between translators is a problem, although comments were requested on this matter in the *NOI*. Nevertheless, we feel that existing translators should be entitled to protection against predicted and actual interference generated by other FM translator stations. FM translator stations are granted on a first come, first served basis. Once established, they provide a significant secondary service to many remote areas throughout the United States. Listeners should not be deprived of clear reception because of the introduction of a competing secondary service FM translator station. We will therefore not grant authority for a new translator to operate if it will predictably cause interference to an existing translator station signal. We will also prohibit a translator station from causing actual interference to the signal of any other pre-existing authorized FM translator station. However, we are unpersuaded that a translator station is entitled to protection against an FM radio broadcast station. Translator stations remain a secondary service and must continue to accept interference from any FM radio broadcast station regardless of the area the translator station is serving. We request comment on this proposal.

TV Channel Six Interference

114. The existing rules provide no specific guidelines for evaluation of interference caused by NCE FM stations operating on the reserved band to television channel six.

115. In the *NOI*, we noted our concern that some NCE FM translators operating on reserved channels serving areas beyond the Grade B contour of a television station operating on channel six may be causing interference to the reception of that station. We mentioned that in the past we have found the non-interference requirements of Section 74.1203(a) sufficient to protect against interference in such cases. However, we asked commenters to advise us whether the adoption of further restrictions was warranted.

116. *Comments.* Six commenters address this issue. Three commenters believe that the current rules provide adequate interference protection and should not be revised.[111] Greater Media favors adopting interference restrictions parallel to those for FM radio broadcast stations.[112] Temple states that allowing NCE FM stations to operate in the commercial band (82-108 MHz) would alleviate channel six interference problems. MST argues that FM transmissions on channels 201-220 can cause interference to Channel 6 reception even when FM translators operate outside the television station's Grade B contour. MST proposes a revised rule which parallels the rule for NCE FM radio broadcast applicants, but eliminates provisions for antenna directivity, polarization and extreme terrain.[113]

117. *Proposal.* We propose to use two methods for dealing with potential interference to television channel six that would apply to translators providing fill-in service, as well as those providing service to other areas. For cases of predicted interference, we propose to adopt the use of the distance separation tables of Section 73.525 currently used to predict interference between television channel six and NCE FM radio broadcast stations. However, with respect to NCE FM translators, we propose to apply this rule without consideration of population or need, for cases of predicted interference. For cases of actual interference, we will require the translator to cease operation if there are a "significant number of complaints" which cannot be resolved by modification of the translator station's operations.[114] We ask commenters to address these proposals.

118. We also ask commenters to consider the feasibility of adopting a less stringent standard. We recognize that reliance upon the distance separation tables of Section 73.525 could unnecessarily preclude consideration of applications for NCE FM translator stations that might not cause actual interference to the signals of Channel six television stations. The signals radiated by the vast majority of television stations are horizontally polarized,[115] while the signals of NCE FM translators may be vertically polarized only. This phenomenon greatly reduces the potential for interference. The potential for interference would be further reduced by adoption of the proposed ERP standard since this will make it easier to predict accurately the areas actually covered by FM translators. FM translators are also relatively low powered and are not required to place any particular energy contour over the community or area proposed to be served. Thus applicants could use intervening terrain features to shield the Channel six service area. Finally, the separation tables are based on maximum allowable power of the NCE FM radio broadcast stations, while FM translators are generally limited to a much lower ERP. For these reasons we believe that the distance separation tables of Section 73.525 of the rules may not accurately predict interference between television Channel six and the lower powered NCE FM translator stations. If this plan is favorably received we would propose to accept an application for an NCE FM translator unless circumstances suggest possible interference to Channel six signals, such as where the television signal is elliptical or circularly polarized and the translator would be located in a populated area within the television station's predicted Grade B contour. Where interference is theoretically conceivable we would require the translator applicant to demonstrate conclusively that the proposal would not cause interference to the reception of the Channel six television signal. During any test periods the translator would be required to cease operation if any interference is caused. For cases of actual interference we would require the translator to cease broadcast operation upon proof of such interference or receipt of a "significant number of complaints." We ask commenters to address these proposals.

OTHER MATTERS

Grandfathering criteria for existing translators

119. The *NOI* did not address the matter of "grandfathering" existing translators that might be in conflict with the rules adopted as a result of this proceeding. However, a few parties comment on this issue. NAB and TBA oppose the "grandfathering" of translators in unserved areas and request that they be required to cease operations when FM radio broadcast stations commence operations in previously unserved areas. KASI, WTSL and KNOT object to the "grandfathering" of existing translators beyond the protected contour of the primary station unless they provide service to an unserved or underserved area. TBA asserts that all translators should be required to comply with revised rules.

120. *Proposal.* We wish to consider a number of alternatives with respect to the possible grandfathering of existing translators. These alternatives include requiring compliance: (1) with all new rules ultimately adopted as a result of this proceeding, granting waivers where needed; (2) with only the new technical rules; (3) within 5 years, at which time the old rules would sunset; (4) at the next renewal cycle; or (5) with the new technical rules when applying for modifications to the existing authorization. We request comment on each of these proposals.

121. We note that requiring translators to come into compliance with new technical rules could have the effect of withdrawing service from areas currently served, a result contrary to the public interest. At the same time we wish to ensure that existing translators do not cause interference to FM radio broadcast stations. We believe, however, that most translators are already in conformance with the technical rules we are proposing. Some of the proposed service requirements would be more stringent than those imposed by the current rules. For example, under the proposed rules primary stations would not be permitted to provide financial support for translators located in other areas. Commenters are asked to consider whether such financial arrangements should be grandfathered, or whether such existing independent party translators should be required to operate without primary station support after some transition period.

122. We further propose that pending, non-mutually exclusive applications should be processed under any new rules that are adopted as a result of this *Notice*. We note that a freeze on applications was imposed by the *NOI* in this proceeding.[116] We propose to continue the applications freeze for 60 days after the effective date of any new rules adopted and, thereafter, to provide a 60 day period for applicants to amend their applications to conform with the new rules.[117] We note that if the modification would result in a "major change," applicants would be required to file new fees in order for the Commission to process those applications. We also seek comment on these proposals.

Revised Rule Section

123. In light of the numerous modifications to the existing translator rules proposed here, we believe that it is also appropriate to undertake a general revision of Part 74, Subpart L, of our rules governing the FM translator and booster services. We propose to reorganize these rules to make them easier to implement and to clarify the language of the rules as needed in order to avoid misinterpretation. We note that the only substantive changes to the proposed rules set forth in Appendix B are those discussed above. Any other modifications in the proposed rules reflect our desire to clarify this subpart. Commenters are asked to consider whether the proposed revision of this rule section would serve the public interest. We also seek suggestions to make these rules easier to understand.

ADMINISTRATIVE MATTERS

124. Authority for this proposed rule making is contained in Sections 1, 3, 4(i) and (j), 303, 308, 309 and 403 of the Communications Act of 1934, as amended. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before June 15, 1990, and reply comments on or before July 16, 1990. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the *Report and Order*.

125. For purposes of this nonrestricted notice and comment rule making proceeding, members of the public are advised that *ex parte* contacts are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda, and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

126. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide, on the same day it is submitted, a copy of the same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, must provide, on the day of the oral presentation, a memorandum to the Secretary (with a copy to the commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.206.

127. As required by Section 603 of the Regulatory Flexibility Act, the FCC has prepared an initial regulatory flexibility analysis (IFRA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth in the Appendix C. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of this *Notice*, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

128. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified requirement or burden upon the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

129. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting documents. If participants want each Commissioner to receive a personal copy of their comments, an original plus eleven copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554.

130. For further information on this proceeding, contact Tatsu Kondo, Policy and Rules Division, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

INITIAL COMMENTS

1. AGK Communications, Inc.
2. Association for Broadcast Engineering Standards, Inc.
3. Association of Maximum Service Telecasters, Inc.
4. Athens Broadcasting Company, Inc.
5. CBS Inc.
6. Central Missouri Broadcasting, Inc.
7. CGS Communications of Kingman, Inc.
8. John Davidson Craver
9. Bruce F. Elving
10. Family Stations, Inc.
11. Federal Trade Commission
12. Fuller-Jeffrey Broadcasting Companies, Inc.
13. Greater Media, Inc.
14. Greater Pacific Radio Exchange, Inc.
15. Hammett & Edison, Inc.
16. Robert Jacoby
17. Robert A. Jones
18. Kansas Association of Broadcasters
19. KASI and KCCQ
20. KMEN/KGGI(FM)
21. KNEN
22. KNKK
23. KNOT
24. KRMH
25. KRRV
26. KRXV, Inc.
27. KYSM
28. John S. La Tour
29. Lew Latto Group of Northland Radio Stations
30. London Bridge Broadcasting, Inc.
31. Lotus Communications Corp.
32. Timothy D. Martz
33. MHS Holdings, Ltd.
34. National Association of Broadcasters
35. National Public Radio
36. National Translator Association
37. NewCity Communications, Inc.
38. New Hampshire Association of Broadcasters
39. Lee S. Parr
40. Pleasant Broadcasters, Incorporated
41. Bruce Quinn
42. Radio One, Inc.
43. Scripps Howard Broadcasting Company
44. Seven Ranges Radio Co., Inc.
45. Slatton-Quick Company, Inc.
46. Byron W. St. Clair
47. St. Marie Communications, Inc.
48. Jon R. Swett
49. Temple University
50. Tucson Broadcasters Association
51. Gerard A. Turro
52. Virginia Association of Broadcasters and North Carolina Association of Broadcasters
53. WDAC Radio Company (Filed w/ Religious Broadcasters)
54. Jerry E. White
55. WIN Communications, Inc.
56. WTSL and WTSL-FM

REPLY COMMENTS

1. Alabama Broadcasters Association
2. Coalition for Scenic Beauty
3. Columbia Bible College Broadcasting Company
4. C.R. Crisler
5. KRXV, Inc.
6. KTKT and KLPX(FM)
7. John S. La Tour
8. Lotus Communications Corp.
9. MHS Holdings, Ltd.
10. Mount Wilson FM Broadcasters
11. National Association of Broadcasters
12. National Public Radio
13. The Rutherford Group, Inc.
14. Tribune Broadcasting Company
15. Tucson Broadcasters Association

LATE - FILED COMMENTS

1. Fraternal Order of Police
2. KRXV, Inc.
3. John S. La Tour
4. MHS Holdings, Ltd.
5. Mount Wilson FM Broadcasters, Inc.
6. National Association of Broadcasters Supplement (NAB Study)

COMMENTS FILED IN RESPONSE TO NAB STUDY

1. Center for Studies of Law in Action
2. Columbia Bible College Broadcasting Company
3. Federal Trade Commission
4. GEICO
5. Hilton Hotels Corporation
6. Integra
7. John S. La Tour
8. MHS Holdings, Ltd.
9. National Association of Chiefs of Police

10. North Carolina Department of Commerce Travel and Tourism

11. Pleasant Broadcasters, Incorporated

12. Scripps Howard Broadcasting Company

13. Gerard A. Turro

REPLY COMMENTS FILED IN RESPONSE TO THE NAB STUDY

1. California Department of Transportation

2. Connecticut State Police

3. Delaware Tourism Office

4. Domino's Pizza

5. Hall of Fame, International, Central Missouri State University

6. Idaho Transportation Department

7. John S. La Tour

8. Louisiana Office of Tourism

9. MHS Holdings, Ltd.

10. Michigan Department of State Police

11. Minnesota Department of Transportation

12 Minnesota State Patrol Division

13. National Association of Broadcasters

14. National Association of Chiefs of Police

15. New Hampshire Division of State Police

16. New Mexico State Highway & Transportation Department

17. Ohio Department of Highway Safety

18. Oregon Department of Economic Development Tourism Division

19. South Carolina Highway Patrol

20. Utah Department of Public Safety

21. Vermont State Police

22. White Mountain Attractions

23. Wisconsin State Patrol

APPENDIX B

Proposed Rule Section

It is proposed to amend Title 47 CFR Parts 1, 73, and 74 as follows:

1. The authority citation for Parts 1, 73, and 74 would continue to read as follows:

Authority: 47 U.S.C. 154 and 303

2. Section 1.1307, paragraph (b), would be amended by revising Note 1 as follows:

Section 1.1307 Actions which may have a significant environmental effect, for which environmental assessments (EAs) must be prepared.

* * * * *

(b) * * *

Note 1: Paragraph (b) shall apply to facilities and operations licensed or authorized under the following Parts of the Commission's Rules: 5, 25, 73, 74 (Subpart A), 74 (Subpart G), 74 (Subpart L; applies only to stations that exceed 10 watts ERP), and 80 (applies only to ship earth stations). Facilities and operations licensed or authorized under all other Parts, Subparts, or Sections of the Commission's Rules shall be categorically excluded from consideration under paragraph (b), unles such exclusion is superseded by actions taken by the Commission under the provisions of paragraphs (c) or (d) of this Section.

* * * * *

3. Section 73.3573(a)(1) would be amended by revising the section heading, by deleting the fourth sentence in paragraph (a)(1), by redesignating the Note at the end of the section as Note 1, and by adding a Note 2, to read as follows:

Section 73.3573(a)(1) Processing FM broadcast station applications.

(a) * * *

(1) Other requests for change in frequency or community of license for FM stations must first be submitted in the form of a petition for Rule Making to amend the Table of Allotments. For noncommercial educational FM stations a major change is any change in frequency or community of license or any change in power or antenna location or height above average terrain (or combination thereof) which would result in a change of 50 percent or more in the area within the station's predicted 1 mV/m field strength contour. * * *

* * * * *

Note 1: Processing of applications for new low power educational FM applications:

* * * * *

Note 2: For rules on processing FM translator and booster stations, see Section 74.1233 of this chapter.

4. Section 74.1201 would be amended by adding paragraphs (g), (h) and (i) to read as follows:

Section 74.1201 Definitions.

* * * * *

(g) Translator coverage area. The area encompassed by the predicted 1 mV/m field strength contour of an FM translator station without regard to the operating channel of the translator station.

(h) Fill in area. The area where the coverage contour of an FM translator or booster station is within the protected contour of the associated primary station (*i.e.*, predicted

0.5 mV/m contour for commercial Class B stations, predicted 0.7 mV/m contour for commercial Class B1 stations, and predicted 1 mV/m contour for all other classes of stations).

(i) Other area. The area where the coverage contour of an FM translator station extends beyond the protected contour of the primary station (*i.e.*, predicted 0.5 mV/m contour for commercial Class B stations, predicted 0.7 mV/m contour for commercial Class B1 stations, and predicted 1 mV/m contour for all other classes of stations).

5. Section 74.1202 would be amended by revising paragraphs (b), (b)(1) and (2), by deleting paragraphs (c) and (d), by redesignating paragraph (e) as paragraph (c), by adding a new paragraph (d), and by revising the Note to this Section to read as follows:

Section 74.1202 Frequency assignment.

* * * * *

(b) Subject to compliance with all the requirements of this subpart, FM broadcast translators may be authorized to operate on the following FM channels, regardless of whether they are assigned for local use in the FM Table of Allotments (§73.202(b) of this chapter):

(1) Commercial FM translators: Channels 221-300.

(2) Noncommercial FM translators: Reserved channels 200-220, subject to the restrictions specified in Section 73.501 of this chapter, and Channels 221-300.

* * * * *

(c) An FM broadcast booster station will be assigned the channel assigned to its primary station.

(d) An application for an FM translator station located within 53 or 54 channels of an FM radio broadcast station will not be accepted for filing if it fails to meet the required separation distance set out in §73.207. For purposes of determining compliance with §73.207, translator stations will be treated as Class A stations; provided, however, that translator stations operating with 10 watts or less ERP will be treated as Class D stations and will not be subject to intermediate frequency separation requirements.

Note: See Section 74.1235 for further restrictions imposed on translators and boosters located within 320 kilometers (approximately 199 miles) of either the Canadian or Mexican borders.

6. Section 74.1203 would be revised to read as follows:

Section 74.1203 Interference.

(a) There are two types of interference - predicted and actual. In the case of predicted interference, an application for an FM translator station will not be accepted for filing if the proposed operation would involve overlap of signal strength contours with any other station, including FM translators and Class D (secondary) noncommercial educational FM stations, as set forth below:

(1) Commercial Class B FM Stations (Protected Contour: 0.5 mV/m)

Frequency separation	Contour of proposed translator station	Contour of commercial Class B station
Co-channel	0.05 mV/m (34 dBu)	0.5 mV/m (54 dBu)
200 kHz	0.25 mV/m (48 dBu)	0.5 mV/m (54 dBu)
400 kHz	5.00 mV/m (74 dBu)	0.5 mV/m (54 dBu)
600 kHz	50.0 mV/m (94 dBu)	0.5 mV/m (54 dBu)

(2) Commercial Class B1 FM Stations (Protected Contour: 0.7 mV/m)

Frequency separation	Contour of proposed translator station	Contour of commercial Class B1 station
Co-channel	0.07 mV/m (37 dBu)	0.7 mV/m (57 dBu)
200 kHz	0.35 mV/m (51 dBu)	0.7 mV/m (57 dBu)
400 kHz	7.00 mV/m (77 dBu)	0.7 mV/m (57 dBu)
600 kHz	70.0 mV/m (97 dBu)	0.7 mV/m (57 dBu)

(3) All Other Classes of FM Stations, including FM translators (Protected Contour: 1 mV/m)

Frequency separation	Contour of proposed translator station	Contour of any other stations
Co-channel	0.1 mV/m (40 dBu)	1 mV/m (60 dBu)
200 kHz	0.5 mV/m (54 dBu)	1 mV/m (60 dBu)
400 kHz	10 mV/m (80 dBu)	1 mV/m (60 dBu)
600 kHz	100 mV/m (100 dBu)	1 mV/m (60 dBu)

Note: An application otherwise precluded by this section will be accepted if it can be demonstrated that no actual interference will occur due to intervening terrain, lack of population or such other factors as may be applicable.

(b) The following standards must be used to compute the distances to the pertinent contours:

(1) The distance of the contours being protected are to be computed using Figure 1 of §73.333 [F(50,50) curves] of this part.

(2) The distance to the interference contours are to be computed using Figure 1a of §73.333 [(F)(50,10) curves]. In the event that the distance to the contour is below 16 kilometers (approximately 10 miles), and therefore not covered by Figure 1a, curves in Figure 1 must be used.

(3) The effective radiated power (ERP) that is the maximum ERP for any elevation plane on any bearing will be used.

(4) The antenna height to be used is the height of the radiation center above the average terrain along each pertinent radial.

(c) An application for a change (other than a change in channel) in the facilities of an FM translator station will be accepted even though overlap of signal strength contours would occur with another station in an area where such overlap does not already exist, if:

(1) The total area of overlap with that station would not be increased:

(2) The area of overlap with any other station would not increase;

(3) The area of overlap does not move significantly closer to the station receiving the overlap; and,

(4) No area of overlap would be created with any station with which the overlap does not now exist.

(d) The provisions of this section concerning prohibited overlap will not apply where the area of such overlap lies entirely over water.

(e) An application for an FM translator station will not be accepted for filing even though the proposed operation would not involve overlap of signal strength contours with any other station, as set forth in Section 74.1203(a) above, if the predicted 1 mV/m field strength contour of the FM translator station will overlap a populated area already receiving a regularly used, off-the-air signal of any authorized co-channel, first, second or third adjacent channel broadcast station, including Class D (secondary) noncommercial educational FM stations and grant of the authorization will result in interference to the reception of such signal.

(f) In the case of actual interference an authorized FM translator or booster station will not be permitted to continue to operate if it causes any interference to:

(1) the transmission of any authorized broadcast station; or

(2) the reception of the input signal of any television translator, television booster, FM translator or FM booster station; or

(3) the direct reception by the public of the off-the-air signals of any authorized broadcast station including Class D (secondary) noncommercial educational FM stations, regardless of the quality of such reception, the strength of the signals so used, or the channel on which the protected signal is carried.

(g) For purposes of Section 74.1203(f)(3) interference to the direct reception of an off-the-air signal will be deemed to occur upon the receipt by the Commission of a significant number of valid and substantiated complaints or upon receipt of such other proof establishing the fact of actual interference.

(h) An FM booster station will be exempt from the provisions of paragraph (f) of this section to the extent it may cause limited interference to its primary station's signal subject to the conditions of paragraph (k) of this section.

(i) If interference cannot be promptly eliminated by the application of suitable techniques, operation of the offending translator station or booster station shall be immediately suspended and shall not be resumed until the interference has been eliminated. Short test transmissions may be made during the period of suspended operation to check the efficacy of remedial measures. If a complainant refuses to permit the translator or booster licensee to apply remedial techniques which demonstrably will eliminate the interference without impairment to the original reception, the licensee of the translator or booster is absolved of further responsibility for that complaint.

(j) It shall be the responsibility of the licensee of an FM translator station or FM booster station to correct any condition of interference which results from the radiation of radio frequency energy by its equipment on any frequency outside the assigned channel. Upon notice by the Commission to the station licensee or operator that such interference is being caused, the operation of the translator station or booster station shall be immediately suspended and shall not be resumed until the interference has been eliminated or it can be demonstrated that the interference is not due to spurious emissions by the FM translator station or FM booster station; provided, however, that short test transmissions may be made during the period of suspended operation to check the efficacy of remedial measures.

(k) An FM booster station may not disrupt the existing service of its primary station nor may it cause interference to the signal provided by the primary station within the boundaries of the principal community to be served.

7. Subpart L would be amended by adding new Section 74.1204 to read as follows:

Section 74.1204 TV Channel 6 protection.

The provisions of this section apply to all applications for construction permits for new or modified facilities for NCE-FM translator stations on Channels 200-220.

(a) Affected TV Channel 6 Station. An affected TV Channel 6 station is a TV broadcast station which is authorized to operate on Channel 6 that is located within the following distances of a NCE-FM translator station operating on Channels 201-220:

TABLE A

NCE-FM channel	Distance (kilometers)	NCE-FM channel	Distance (kilometers)
201	265	211	196
202	257	212	195
203	246	213	193
204	235	214	187
205	225	215	180
206	211	216	177
207	196	217	174
208	196	218	166
209	196	219	159
210	196	220	154

(b) Collocated Stations. An application for a NCE-FM translator station operating on Channels 201-220 and located at 0.4 kilometer (approximately 0.25 mile) or less from a TV Channel 6 station will be accepted if it includes a certification that the applicant has coordinated its antenna with the affected TV station.

(c) Calculation of Predicted Interference. Predictions of interference required under this section are made as follows:

(1) The distances to the TV Channel 6 field strength contours will be predicted according to the procedures specified in Section 73.684. "Prediction of coverage," using the F(50,50) curves in Figure 9, Section 73.699.

(2) For each TV Channel 6 field strength contour, there will be an associated F(50,10) FM translator interference contour the value of which (in units of dBu) is defined as the sum of the TV Channel 6 field strength (in dBu) and the appropriate undesired-to-desired (U/D) signal ratio (in dB) obtained from Figures 1 and 2, Section 73.599, corresponding to the channel of the NCE-FM translator applicant and the appropriate F(50,50) field strength contour of the TV Channel 6 station.

(3) The distances to the applicable NCE-FM translator interference contours will be predicted according to the procedures specified in Section 73.313 "Prediction of Coverage" using the proposed antenna height and horizontally polarized, or horizontal equivalent of the vertically polarized, effective radiated power in the pertinent direction and the F(50,10) field strength curves (Figure 1a, Section 73.333).

(4) The predicted interference area will be defined as the area within the TV Channel 6 station's 47 dBu field strength contour that is bounded by the locus of intersections of a series of TV Channel 6 field strength contours and the applicable NCE-FM translator interference contours.

(5) In cases where the terrain in one or more directions departs widely from the surrounding terrain average (for example, an intervening mountain), a supplemental showing may be made. Such supplemental showings must describe the procedure used and should include sample calculations. The application must also include maps indicating the predicted interference area for both the regular method and the supplemental method.

(d) Channel 200 Applications. No application for use of NCE-FM Channel 200 will be accepted if the requested facility would cause objectionable interference to TV Channel 6 operations. Such objectionable interference will be considered to exist whenever the 15 dBu contour based on the F(50,10) curves in Section 73.333, Figure 1(a) would overlap the 40 dBu contour based on the F(50,50) curves in Section 73.699, Figure 9.

8. Section 74.1231 would be amended by revising paragraph (b), and adding an accompanying Note, revising the text of existing paragraphs (c), (e), (f), (g), and (h), and an accompanying Note to (h), and deleting paragraph (i) by incorporating it into (c) to read as follows:

Section 74.1231 Purpose and permissible service

* * * * *

(b) An FM translator may be used for the purpose of retransmitting the signals of a primary FM radio broadcast station or another translator station which have been received directly through space, converted, and suitably amplified. However, a noncommercial educational FM translator station operating on a reserved channel (Channel 200-220) and owned and operated by the licensee of the primary noncommercial educational FM station it rebroadcasts may use alternative signal delivery means, including, but not limited to, satellite and terrestrial microwave facilities. A commercial FM translator providing fill-in service may use terrestrial microwave facilities. Booster stations may also receive the signals of primary broadcast service stations through alternative signal delivery means, including, but not limited to, satellite and terrestrial microwave facilities.

Note. For paragraphs (b) and 74.1231(h) auxiliary intercity relay microwave frequencies may be used to deliver signals to FM translator and booster stations on a secondary basis only. Such use shall not interfere with or otherwise preclude use of these broadcast auxiliary stations from transmitting aural programming between broadcast stations as provided in paragraphs 74.531(a) and (b). Prior to filing an application for an auxiliary intercity relay microwave frequency, the applicant shall notify the appropriate frequency coordination committee, or any licensees assigned the use of the proposed operating frequency in the intended location or area of operation, of the proposed operating frequency.

(c) The transmissions of each FM translator or booster station shall be intended only for direct reception by the general public. An FM translator or booster shall not be operated *solely* for the purpose of relaying signals to one or more fixed received points for retransmission, distribution, or further relaying in order to establish a point-to-point FM radio relay system.

* * * * *

(e) An FM translator shall not deliberately retransmit the signals of any station other than the station it is authorized to retransmit. Precautions shall be taken to avoid unintentional retransmission of such other signals.

(f) A locally generated radio frequency signal similar to that of an FM broadcast station and modulated with aural information may be connected to the input terminals of such FM translators for the purpose of transmitting voice announcements. The radio frequency signals shall be on the same channel as the normally used off-the-air signal being rebroadcast. Connection of the locally generated signals shall be made automatically by means of a time-switch when transmitting originations concerning financial support. The connection for emergency transmissions may be made manually. The apparatus used to generate the local signal that is used to modulate the FM translator must be capable of producing an aural signal which will provide acceptable reception on FM receivers designed for the transmission standards employed by FM broadcast stations.

(g) The aural material transmitted as permitted in paragraph (f) of this section shall be limited to emergency warnings of imminent danger and to seeking or acknowledging financial support deemed necessary to the continued operation of the translator. Originations concerning financial support are limited to a total of 30 seconds an hour. Within this limitation the length of any particular announcement will be left to the discretion of the translator station licensee. Solicitations of contributions shall be limited to the defrayal of the costs of installation, operation and maintenance of the translator or acknowledgements of financial support for those purposes. Emergency transmissions shall be no longer or more frequent than necessary to protect life and property.

(h) FM broadcast booster stations provide a means whereby the licensee of an FM broadcast station may provide service to areas in any region within the primary station's predicted, authorized service contours. An FM broadcast booster station is authorized to retransmit only the signals of its primary station which have been received directly through space and suitably amplified, or received by alternative signal delivery means including, but not limited to, satellite and terrestrial microwave facilities. The FM booster station shall not retransmit the signals of any other station nor make independent transmissions, except that locally generated signals may be used to excite the booster apparatus for the purpose of conducting tests and measurements essential to the proper installation and maintenance of the apparatus.

Note: In the case of an FM broadcast station authorized with facilities in excess of those specified by Section 73.211 of this chapter, an FM booster station will only be authorized within the protected contour of the class of station being rebroadcast as predicted on the basis of the maximum powers and heights set forth in that section for the applicable class of FM broadcast station concerned.

9. Section 74.1232 would be amended by revising paragraph (b) and adding a Note, by revising paragraph (d), removing the notes following paragraph (d) and adding a

new note to paragraph (d), adding new paragraph (e), by redesignating and revising existing paragraphs (e) through (g) as paragraphs (f) through (h) to read as follows:

Section 74.1232 Eligibility and licensing requirements.

* * * * *

(b) More than one FM translator may be licensed to the same applicant, whether or not such translators serve substantially the same area, upon an appropriate showing of technical need for such additional stations. FM translators are not counted as FM stations for the purpose of Section 73.3555, concerning multiple ownership.

Note: As used in this section need refers to the quality of the signal received and not to the programming content, format, or transmission needs of an area.

* * * * *

(d) An authorization for a commercial FM translator whose predicted 1 mV/m field strength contour extends beyond the protected contour of the primary station will not be granted to the licensee or permittee of an FM radio broadcast station. For the purposes of this subpart, the protected contour of the primary station shall be defined as follows: Commercial Class B and B1 stations will be protected to their predicted 0.5 mV/m and 0.7 mV/m contours, respectively, as specified in Section 73.215 of the Commission's rules; all other FM radio broadcast stations will be protected to their predicted 1 mV/m field strength contour. The 1 mV/m contour shall be as predicted in accordance with Section 73.313(a) through (d) of this chapter. In the case of an FM radio broadcast station authorized with facilities in excess of those specified by Section 73.211 of this chapter, an FM booster station will only be authorized within the protected contour of the class of station being rebroadcast, as predicted on the basis of the maximum powers and heights set forth in that section for the applicable class of FM broadcast station concerned.

(e) A commercial FM translator station whose predicted 1 mV/m field strength contour goes beyond the protected contour of the primary station shall not receive any support, before or after construction, either directly or indirectly, from any FM radio broadcast station.

(f) An FM broadcast booster station will be authorized only to the licensee or permittee of the FM radio broadcast station whose signals the booster station will retransmit, to serve areas within the protected contour of the primary station, subject to Note, Section 74.1231(h).

(g) No numerical limit is placed upon the number of FM booster stations which may be licensed to a single licensee. A separate application is required for each FM booster station. FM broadcast booster stations are not counted as FM broadcast stations for the purposes of Section 73.5555 concerning multiple ownership.

(h) Any authorization for an FM translator station issued to an applicant described in paragraphs (d) and (e) of this section will be issued subject to the condition that it may be terminated at any time, upon not less than sixty (60) days written notice, where the circumstances in the community or area served are so altered as to have prohibited grant of the application had such circumstances existed at the time of its filing.

10. Subpart L would be amended by adding new Section 74.1233 to read as follows:

Section 74.1233 Processing FM translator and booster station applications.

(a) Applications for FM translator and booster stations are divided into two groups:

(1) In the first group are applications for new stations or for major changes in the facilities of authorized stations. In the case of FM translator station changes a major change is any change in frequency (output channel), or change in area to be served greater than ten percent of the previously authorized 1 mV/m contour. All other changes will be considered minor. All major changes are subject to the provisions of Sections 73.3580 and 1.1104 of the rules pertaining to major changes.

(2) In the second group are applications for licenses and all other changes in the facilities of the authorized station.

(b) Applications for FM translator and booster stations will be processed as nearly as possible in the order in which they are filed. Such applications will be placed in the processing line in numerical sequence, and will be drawn by the staff for study, the lowest file number first. In order that those applications which are entitled to be grouped for processing may be fixed prior to the time processing of the earliest filed application is begun, the FCC will periodically release a Public Notice listing applications which have been accepted for filing and announcing a date (not less than 30 days after publication) on which the listed applications will be considered available and ready for processing and by which all mutually exclusive applications and/or petitions to deny the listed applications must be filed.

(c) In the case of an application for an instrument of authorization, other than a license pursuant to a construction permit, grant will be based on the application, the pleadings filed, and such other matters that may be officially noticed. Before a grant can be made it must be determined that:

(1) There is not pending a mutually exclusive application filed in accordance with paragraph (b) of this section.

(2) The applicant is legally, technically, financially and otherwise qualified;

(3) The applicant is not in violation of any provisions of law, the FCC rules, or established policies of the FCC; and

(4) A grant of the application would otherwise serve the public interest, convenience and necessity.

(d) Applications for FM translator stations proposing to provide fill-in service (within the primary station's protected contour) of the commonly owned primary station will be given priority over all other applications.

(e) Where applications for FM translator stations are mutually exclusive and do not involve a proposal to provide fill-in service of a commonly owned primary station, the FCC may stipulate different frequencies as necessary for the applicants.

(f) Where there are no available frequencies to substitute for a mutually exclusive application, the FCC will base its decision on the following priorities: (1) first full-time aural service; (2) second full-time aural service; and (3) other public interest matters including, but not limit-

ed to the number of aural services received in the proposed service area, the need for or lack of public radio service, and other matters such as the relative size of the proposed communities and their growth rate.

11. Section 74.1235 would be amended by revising the section heading, by revising paragraph (a), by deleting paragraphs (a)(1) through (a)(4), by adding new paragraphs (b) through (d), and by redesignating existing paragraphs (b) and (c) as paragraphs (f) and (g), to read as follows:

Section 74.1235 Power limitations and antenna systems.

(a) The maximum allowable ERP in any direction shall be such that the distance to the 1 mV/m (60 dBu) field strength contour of the FM translator shall not exceed 16 kilometers (approximately 10 miles) from the proposed transmitter site. The antenna height above average terrain shall be computed along each of 12 distinct radials, with each radial spaced 30 degrees apart and with the bearing of the first radial being true north; provided, however, that in no event shall the ERP of the translator station exceed 1 kW. For example:

ERP (watts)	HAAT (meters)
1000	77
600	98
500	107
50	340
10	860

(b) Composite antennas and antenna arrays may be used where the total ERP does not exceed the maximum specified in subpart (a) of this Section.

(c) Either horizontal, vertical, circular or elliptical polarization may be used provided that the supplemental vertically polarized ERP required for circular or elliptical polarization does not exceed the ERP otherwise authorized. Either clockwise or counterclockwise rotation may be used. Separate transmitting antennas are permitted if both horizontal and vertical polarization is to be provided.

(d) All applications must be filed in compliance with Sections 73.316(d)-(h) of this Chapter.

(e) Additionally, applicants planning to use directional antennas must comply with Section 73.316(c)(1)-(3). Prior to issuance of a license, the applicant must: 1) certify that the antenna is mounted in accordance with the specific instructions provided by the antenna manufacturer; and 2) certify that the antenna is mounted in the proper orientation. In instances where a directional antenna is proposed for the purpose of providing protection to another facility, a condition may be included in the construction permit requiring that before program tests are authorized, a permittee: 1) must submit the results of a complete proof-of-performance to establish the horizontal plane radiation patterns for both the horizontally and vertically polarized radiation components; and, 2) must certify that the relative field strength of neither the measured horizontally nor vertically polarized radiation component shall exceed at any azimuth the value indicated on the composite radiation pattern authorized by this construction permit.

(f) In no event shall a station authorized under this subpart be operated with a power output in excess of the transmitter type-accepted rating.

(g) The output power of FM booster stations shall be limited such that the predicted service contour of such stations computed in accordance with Section 73.313 (a) - (d), may not extend beyond the area covered by the predicted service contour of the primary station that they rebroadcast and that such output power may not exceed 20 percent of the maximum allowable effective radiated power for the primary station's class. Further, FM booster stations shall be subject to the requirement that the signal of any first adjacent channel station must exceed the signal of the booster station by 6 dB at all points within the protected contour of any first adjacent channel station, except that in the case of FM stations on adjacent channel spacings that do not meet the minimums specified in Section 73.207, the signal of any first adjacent channel station must exceed the signal of the booster by 6 dB at any point within the predicted interference free contour of the adjacent channel station.

(h) Reserved.

(i) Applicants for FM translator stations located within 320 km of the Canadian border may operate with no more than 50 watts effective radiated power in any direction within an interference contour (34 dBu) not to exceed 34 km. FM translator stations located within 320 kilometers of the Mexican border must be separated from Mexican allotments and assignments in accordance with Section 73.207(b)(3) of this chapter. For purposes of compliance with that section, FM translators will be considered as Class D FM stations.

12. Section 74.1236 would be amended by revising paragraph (a) to read as follows:

Section 74.1236 Emission and bandwidth.

(a) The license of a station authorized under this subpart allows the transmission of each F3 or other types of frequency modulation (see §2.201) upon a showing of need as long as the emission complies with the following:

* * * * *

13. Section 74.1237 would be amended by revising paragraph (d) to read as follows:

§74.1237 Antenna location.

* * * * *

(d) The transmitting antenna of a commonly owned FM translator station shall be located within the protected contour of its FM station, subject to Note, Section 74.1231(h).

14. Section 74.1250 would be revised to read as follows:

Section 74.1250 Transmitters and associated equipment.

(a) FM translator and booster transmitting apparatus used by stations authorized under the provisions of this subpart must be type accepted or notified upon the request of any manufacturer of transmitters following the procedures described in Section 73.1660 and Subpart J of Part 2. If acceptable, the transmitter will be included in the FCC's "Radio Equipment List, Equipment Acceptable for Licensing."

(b) Transmitting antennas, antennas used to receive signals to be rebroadcast, and transmission lines are not subject to the requirement for type acceptance.

(c) The local oscillator or oscillators used in the exciter to provide a locally generated and modulated input signal to the translator, when subjected to variations in ambient temperature between minus 30 [/d] and plus 50 [/d] centigrade, and in primary supply voltage between 85 percent and 115 percent of the rated value, shall be sufficiently stable to maintain the output center frequency of the exciter within plus or minus 0.005 percent of the frequency assigned to the primary station.

(1) Automatic means shall be provided for limiting the level of the audio frequency voltage applied to the modulator to ensure that a frequency swing in excess of 75 kHz will not occur under any condition of the modulation.

15. Section 74.1251 would be amended by revising the section heading, revising paragraphs (b), (b)(7), (b)(8), removing paragraph (b)(9), and adding paragraph (c) to read as follows:

Section 74.1251 Technical and equipment modifications.

* * * * *

(b) Formal application on FCC Form 349 is required of all permittees and licensees for any of the following changes:

* * * * *

(7) Any change of authorized effective radiated power.

(8) Any change in area being served.

(c) Changes in the primary FM station being retransmitted must be submitted to the FCC in writing.

16. Section 74.1261 would be revised to read as follows:

Section 74.1261 Frequency tolerance.

(a) The licensee of an FM translator or booster station with an authorized transmitter output power greater than 10 watts shall maintain the center frequency at the output of the translator within 0.01 percent of its assigned frequency.

(b) The licensee of an FM translator or booster station with an authorized transmitter power 10 watts or less shall maintain the center frequency at the output of the translator or booster station in compliance with the requirement of Section 73.1545(b)(2).

17. Section 74.1263 would be amended by revising paragraph (a), revising and redesignating existing paragraph (c) as paragraph (b), adding new paragraphs (c) and (d), redesignating existing paragraph (b) as paragraph (e) and revising the text of that paragraph to read as follows:

Section 74.1263 Time of operation.

(a) The licensee of an FM translator or booster station is not required to adhere to any regular schedule of operation. However, the licensee of an FM translator or booster station is expected to provide a dependable service to the extent that such is within its control and to avoid unwarranted interruptions to the service provided.

(b) An FM translator or booster station rebroadcasting the signal of a primary station shall not be permitted to radiate during extended periods when signals of the primary station are not being retransmitted.

(c) The licensee of an FM translator or booster station must notify the Commission of its intent to discontinue operations for 30 or more consecutive days. Notification must be made within 48 hours of the time the station first discontinues operation and Commission approval must be obtained for such discontinued operation. The notification shall specify the causes of the discontinued operation and a projected date for the station's return to operation, substantiated by suppporting documentation. If the projected date for the station's return operations cannot be met, another notification and further request for discontinued operations must be submitted in conformance with the requirements of this section. Within 48 hours of the station's return to operation, the licensee must notify the Commission of such fact. All notification must be in writing.

(d) The licensee of an FM translator or booster station must notify the Commission of its intent to permanently discontinue operations at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation.

(e) Failure of an FM translator or booster station to operate for a period of 30 or more consecutive days, except for causes beyond the control of the licensee, shall be deemed evidence of permanent discontinuance of operation and the license of the station may be cancelled at the discretion of the Commission.

18. Section 74.1269 would be revised to read as follows:

Section 74.1269 Copies of rules.

The licensee or permittee of a station authorized under this subpart shall have a current copy of Volumes I (Parts 0, 1, 2 and 17) and III (Parts 73 & 74) of the Commission's Rules and shall make the same available for use by the operator in charge. Each such licensee or permittee shall be familiar with those rules relating to stations authorized under this subpart. Copies of the Commission's Rules may be obtained from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402.

19. Section 74.1283 would be amended by removing paragraph (a), redesignating existing paragraph (e) as paragraph (a), adding a new paragraph (b), revising paragraphs (c), (c)(1), and (c)(2), and redesignating existing paragraph (b) as paragraph (d) and existing paragraph (d) as paragraph (e), to read as follows:

Section 74.1283 Station identification.

(a) The call sign of an FM broadcast translator station will consist of the initial letter K or W followed by the channel number assigned to the translator and two letters. The use of the initial letter will generally conform to the pattern used in the broadcast service. The two letter com-

binations following the channel number will be assigned in order and requests for the assignment of particular combinations of letters will not be considered.

(b) The call sign of an FM booster station will consist of the call sign of the primary station followed by the letters "FM" and the number of the booster station being authorized, *e.g.*, WFCCFM-1.

(c) A translator station authorized under this subpart shall be identified in one the following methods.

(1) By arranging for the primary station whose station is being rebroadcast to identify the translator station by call sign and location. Three such identifications shall be made during each day: once between 7 a.m. and 9 a.m., once between 12:55 p.m. and 1:05 p.m. and once between 4 p.m. and 6 p.m. Stations which do not begin their broadcast before 9 a.m. shall make their first identification at the beginning of their broadcast days. The licensee of an FM translator whose station identification is made by the primary station must arrange for the primary station licensee to keep in its file, and available to FCC personnel, the translator's call letters and location, giving the name, address and telephone number of the licensee or his service representative to be contacted in the event of malfunction of the translator. It shall be the responsibility of the translator licensee to furnish current information to the primary station licensee for this purpose.

(2) By transmitting the call sign in International Morse Code at least once each hour. Transmitters of FM broadcast translator stations of more than 1 watt transmitter output power must be equipped with an automatic keying device that will transmit the call sign at least once each hour, unless there is in effect a firm agreement with the translator's primary station as provided in §74.1283(c)(1). Transmission of the call sign can be accomplished by:

(i) Frequency shifting key; the carrier shift shall not be less than 5 kHz nor greater than 25 kHz.

(ii) Amplitude modulation of the FM carrier of at least 30% modulation. The audio frequency tone use shall not be within 200 hertz of the Emergency Broadcast System Attention signal alerting frequencies.

(d) FM broadcast booster stations shall be identified by their primary stations, by the broadcasting of the primary station's call signs and location, in accordance with the provisions of Section 73.1201 of this chapter.

(e) The Commission may, in its discretion, specify other methods of identification.

APPENDIX C

Initial Regulatory Flexibility Act Analysis

Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds:

I. *Reason for Action*. In response to seven petitions for rule making, the Commission issued a *Notice of Inquiry* (*NOI*), 3 FCC Rcd 3664 (1988), to study the role of FM translators in the radio broadcast service. Because the petitioners sought varying and conflicting changes to our rules, we found that a broad reexamination of our policies regarding the authorization and operation of FM translators would be timely and appropriate. Therefore, the *NOI* sought comment on all aspects of our general policies regarding FM translators, as well as on specific proposals for revisions to our rules. Based on the comments received in response to the *NOI* and our own analysis of FM translator matters, we conclude that our existing regulatory structure should be revised in order to satisfy the intended purposes of the FM translator service. We find there is a need to clarify and tighten several of our rules in order to ensure that FM radio broadcast stations are not adversely impacted by translator operations. We also have determined that our FM translator rules can be modified to provide better service to listeners. The Commission's objective, consistent with its mandate under the Communications Act of 1934, as amended, is to provide service to the public to the greatest extent possible consistent with its concern that any action taken does not interfere with existing radio service.

II. *Objectives*. The Commission is reexamining its FM translator policies to determine whether the existing regulatory scheme is the most effective use of the FM radio service.

III. *Legal Basis*. Authority for action as proposed in this rule making proceeding is provided in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

IV. *Description, potential impact and number of small entities affected*. The number of entities affected will depend on the action we ultimately take regarding the FM translator service. FM translators could be affected, for example, by changing the technical standards concerning maximum permissible power, and by prohibiting any financial support from the primary station to any commercial FM translators in other areas. We observe that currently there are 1,769 FM translators on the air and construction permits for another 318 FM translators have been granted by the Commission.

V. *Reporting, record keeping and other compliance requirements*. None.

VI. *Federal rules which overlap, duplicate or conflict with this rule*. None.

VII. *Any significant alternatives minimizing impact on small entities and consistent with the stated objectives*. In this proceeding, the Commission intends to consider the full range of options for FM translator service and to pay careful attention to the effects of the various options on small entities, particularly existing FM radio broadcast stations.

FOOTNOTES

[1] Currently, there are 1,803 FM translators on-the-air. *Broadcasting*, February 5, 1990, at p. 18. Construction permits have been granted for another 318 translators.

The current rules also recognize FM booster stations which receive, amplify and retransmit signals on the same frequencies as the FM radio broadcast station. Booster stations are authorized only to the licensee of the primary station they rebroadcast and are limited to operations within the protected contour of that station. The Commission recently revised its FM booster rules to authorize higher power FM boosters and to permit them to rebroadcast signals received by any distribution technology the licensee deems suitable. *See Report and Order* in MM Docket No. 87-13, 2 FCC Rcd 4625 (1987). We will not propose revisions to the rules governing the FM booster service in this *Notice*.

[2] An FM radio broadcast station whose signal is rebroadcast by an FM translator is referred to as the "primary station." *See* 47 CFR §74.1201(d).

[3] Recently, the rules were modified to permit licensees of noncommercial educational FM stations operating on reserved channels to use any distribution technology they deem suitable to transmit programming to their own translators subject to certain conditions. *See Report and Order* in MM Docket No. 86-112, 3 FCC Rcd 2196 (1988), *recon. Memorandum Opinion and Order* in MM Docket No. 86-112, FCC 89-216, 4 FCC Rcd 6459 (1989).

[4] *See Notice of Proposed Rule Making* in Docket No. 17159, 34 FR 761 (1969), *Report and Order* in Docket No. 17159, 20 Rad. Reg. 2d (P&F) 1538 (1970).

[5] 47 CFR §74.1231(a).

[6] 20 Rad. Reg. 2d at 1541.

[7] The FM translator rules are set forth at 47 CFR §§74.1201-74.1284. The Commission also issued a *Guide to FM Translator Rules and Policies* to emphasize the need for translator licensees and applicants to conform to the existing FM translator rules. *See Public Notice*, 55 Rad. Reg. 2d (P&F) 1247 (1984).

[8] Rule making petitions were filed by the National Association of Broadcasters (NAB), AGK Communications, Inc. (AGK), John Davidson Craver (Craver), John S. La Tour (La Tour), Communications General Corp., Bruce Quinn (Quinn), and Robert Jacoby (Jacoby). These petitions, and responsive comments to them, were discussed in detail in the *NOI*. *See* 3 FCC Rcd at 3665-3668.

[9] Appendix A lists parties commenting in this proceeding.

[10] *Order Reopening the Period for Filing Comments* in MM Docket No. 88-140, 3 FCC Rcd 7050 MM Bur.(1988).

[11] The existing rule regarding the secondary status of FM translators, which requires that their operation not cause interference to any other broadcast station, will be retained. *See* 47 CFR §74.1203.

[12] The proposed rules are set forth in Appendix B.

[13] 20 Rad. Reg. 2d at 1541, para. 6.

[14] 47 CFR §74.1232(d)(1).

[15] 20 Rad. Reg. 2d at 1541, para. 6.

[16] *See Report and Order* and *Memorandum Opinion and Order* in MM Docket No. 86-112, *supra*. The recently adopted rules require that, during a three-year transition period, applicants for such NCE FM translators proposing to use alternative signal delivery must demonstrate that an alternative frequency providing comparable coverage remains available. Applicants are exempt from making a showing if the proposed translator is either within 80 kilometers (50 miles) of the 1 mV/m contour of the FM radio broadcast station or is greater than 160 kilometers (100 miles) from any NCE FM station.

[17] The Commission's rules state that a translator license may be granted to "any qualified individual, organized group of individuals, or local civil government body" in addition to the licensee of an FM radio broadcast station. *See* 47 CFR §74.1232(a). This category of licensee will be referred to as an "independent" party.

[18] 20 Rad.Reg. 2d (P&F) at 1541, para. 6.

[19] NAB; Greater Pacific Radio Exchange, Inc. (Greater Pacific); Greater Media; Athens Broadcasting Co. (Athens); WTSL and WTSL-FM (WTSL); Alabama Broadcasters Association; Scripps Howard Broadcasting Co. (Scripps Howard); KASI and KCCQ (KASI); Lotus Communications Corp. (Lotus); the National Translator Association (NTA), the Virginia Association of Broadcasters and North Carolina Association of Broadcasters (VAB and NCAB); KRXV, Inc. (KRXV); Kansas Association of Broadcasters (KAB); CGS Communications of Kingman, Inc. (CGS); National Public Radio (NPR); CBS; KTKT and KLPX-FM (reply comments); and New Hampshire Association of Broadcasters (NHAB). London Bridge Broadcasting, Inc. (London Bridge), licensee of an FM station in Arizona, would only authorize translators' operations outside the primary station's 1 mV/m contour if they do not intrude upon the authorized service contour of two or more commercial broadcast stations, asserting that the presence of two local signals ensures competitive local service.

[20] From a policy perspective, NAB argues, the advantage of booster service is that boosters operate co-channel to primary stations and cannot be used to extend the FM radio broadcast station's 1 mV/m contour without co-channel or adjacent channel interference to other FM radio broadcast stations.

[21] *E.g.*, La Tour, the Lew Latto Group of Northland Radio Stations (Latto).

[22] NAB (reply) contends that the Commission already has a definition of "underserved," *i.e.*, areas receiving from zero to three daytime or nighttime services." (*Second Further Notice of Inquiry and Notice of Proposed Rule Making* in BC Docket No. 81-742, *summarized* at 53 FR 31894 (Aug. 16, 1988). "Underserved" is a factor relevant to Commission evaluation of competing applications for broadcast stations and has never been relied upon as a basis to grant or deny an application for an FM translator license. We see no need to adopt this factor for FM translator service. Moreover, our definitions for "other," and "fill-in" service, discussed *infra*, are more precise terms for defining types of FM translator service.

[23] Throughout this *Notice*, we will refer to these two classifications when we find that the equivalent rule is not appropriate for both categories. When no classification is specified, the proposal will be for all translators.

[24] We want to emphasize that under these revised rules, where the predicted service contour of a proposed commercial FM translator would serve an area that meets the fill-in definition in part and the other area definition in part, the primary station would be prohibited from translator ownership.

[25] *See* 47 CFR §74.1232(a).

[26] *See First Report and Order* in MM Docket No. 84-231, 100 FCC 2d 1332 (1985).

[27] 47 CFR §74.1232(d).

[28] The minimum separation distances for FM stations provided in Section 73.207 of the rules reflect protection to the 0.5 and 0.7 mV/m contours for commercial Class B and B1 stations, respectively. *See Report and Order* in BC Docket No. 80-90, 48 FR 29486 (1983). In addition, the Commission's order authorizing high-power FM booster stations permits such stations to provide service to the 0.5 and 0.7 mV/m contours of Class B and B1 stations, respectively. *See Report and Order* in MM Docket No. 87-13, *supra*.

[29] To remedy this situation, TBA recommends a protected contour of 0.5 mV/m, increasing the required distance separation from 134 km to 165 km.

[30] 47 CFR §74.1232(d)(2). We note that there is no prohibition against financial support by FM station licensees to independent parties for the operation of FM translators either within the primary station's 1 mV/m predicted contour or in areas where there is no predicted FM service.

[31] 47 CFR §74.1232(d), Note 2.

[32] We noted that, in 1970, the Commission adopted these restrictions on translators owned or operated by FM radio broadcast stations in order to lessen the impact these translators might have if they expanded their area of coverage to markets already served by other FM radio broadcast stations. In this regard, the Commission was concerned about the adverse impact translators could have on small, marginally profitable stations located in small markets or rural areas. 20 Rad. Reg. 2d (P&F) at 1541, para. 6.

[33] By "third party" translator licensee, NAB refers to "entrepreneurs" seeking to turn the operation of the FM translator into a profitable business operation.

[34] CBS; KASI; KRVX; KTKT and KLPX-FM (reply); Lotus; KNOT; Greater Media; CGS Communications of Kingman, Inc. (CGS); VAB and NCAB; WTSL; Slatton-Quick Co., Inc. (Slatton-Quick); and Jon R. Swett, a broadcast engineer.

[35] London Bridge would prohibit all financial support from the primary station to third-party owned translators because, in practice, there is no limit on operational support the primary station can provide, and payments for maintenance and operation amortize the original construction cost which the primary station was not allowed to provide outright. TBA concurs. Similarly, Greater Pacific alleges that some third-party translator operators "lease" the translators to primary stations in exchange for cash payments and advertising on the primary station, and use the revenues thus derived to recover amounts in excess of the translators' operation and maintenance costs.

[36] We do not propose to impose a financial support restriction on NCE FM translators.

[37] Until the issue of support is finally resolved, we will continue to defer action on all pending applications which raise questions bearing on this issue.

[38] 47 CFR §74.1231(g).

[39] *Id.*

[40] *See Guide to FM Translator Rules and Policies*, 55 Rad. Reg. 2d (P&F) at 1248. This policy against profit-making from translator operation was not codified in the rules. Any new rules we may adopt in this proceeding will, of course, supersede any guidelines set forth in the *Guide to FM Translator Rules and Policies*, *supra*.

[41] *See* FCC Public Notice, FCC 86-161, April 11, 1986.

[42] NAB, CBS, KRXV, KASI, VAB and NCAB, NHAB, Lotus, London Bridge, Greater Pacific, Athens and KYSM.

[43] La Tour, Craver, and Bruce Elving (Elving), a translator permitee.

[44] *See* 47 CFR §§74.1201(a), 74.1231(a) and 74.1284(a).

[45] 47 CFR §74.1231(g).

[46] 47 CFR §74.1284(b). *See Guide to FM Translator Rules and Policies*, 55 Rad. Reg. 2d (P&F) at 1248.

[47] La Tour, Craver, Jacoby and Quinn.

[48] CBS; Lotus; NTA; Scripps-Howard; VAB and NVAB; TBA; NewCity Communications, Inc. (NewCity); KASI; Seven Ranges Radio; Greater Media; St. Marie Communications; KNEN; Radio One, Inc; and the Association for Broadcast Engineering Standards, Inc. (ABES).

[49] *Notice of Inquiry* in MM Docket No. 87-267, 2 FCC Rcd 5014 (1987).

[50] The FTC study uses Arbitron's radio market surveys as its source for radio station counts. Stations that are listed in these surveys meet a minimum reporting criterion not required of stations listed in Arbitron's TALO (Total Audience Listening Output) reports. The FTC contends that only those stations that meet the minimum reporting standard are likely to influence the format decisions of the owners of stations capable of reaching all the listeners in a particular market.

[51] The statistics were derived using Arbitron's Spring 1988 TALO reports which lists all stations receiving diary "mentions" by persons age 12 and above in a given county. Pleasant Broadcasters Incorporated (Pleasant) also uses the TALO report to show that in its county 56 different radio stations are heard. Pleasant contends that introduction of translator service which duplicates programming of one of those 56 stations will neither diversify format nor increase listening. In this regard, Scripps Howard suggests that the potential interference from additional translators in frequency congested areas can actually reduce program service to an area.

[52] La Tour, Craver, Jacoby, Quinn, Timothy D. Martz (Martz), MHS Holdings, Ltd. (MHS), Latto, Elving and Turro.

[53] Some of these commenters propose limiting program authority to services such as travellers' information service (MHS) and consumer "yellow pages" (Jacoby).

[54] La Tour, Craver, Quinn and Elving. Martz proposes low power translator programming authority in markets with less than two radio stations.

[55] Latto supports local program origination on translators in small towns where no FM radio broadcast station is licensed and no regular broadcast service is available.

[56] CBS, NewCity, KASI, Greater Media, and St. Marie Communications.

[57] *See Second Report and Order* in Docket No. 20735, 69 FCC 2d 240 (1978). The Commission terminated the acceptance of applications for low-power Class D noncommercial stations and required existing Class D stations either to upgrade to Class A facilities or move to nonreserved commercial channels. Class D stations that chose to move to the commercial band no longer had primary status, but could only operate on a secondary non-interference basis. In addition, the Commission no longer permitted these stations to remain on their original noncommerical channel, with secondary status.

[58] On July 28, 1989, Gerard Turro filed a request for waiver of Section 74.1231 of the Commission's Rules to permit his FM translator station to originate local programming. By Public Notice, DA 89-933, released August 3, 1989, the Commission requested comment on this waiver petition. In light of the commonality of issues raised by the Turro petition and the instant proceeding, we believe it would be in the public interest to subsume the issues raised by this waiver petition herein. Comments already filed in response to the Public Notice will, therefore, be incorporated into the record of MM Docket No. 88-140.

[59] NAB and Greater Media. Furthermore, these commenters do not suggest that local service obligations be a condition for program origination authority.

[60] 47 CFR §74.1231(b).

[61] *See Memorandum Opinion and Order* in MM Docket No. 86-112, *supra*. A proposal to expand this authority to independent-party owned NCE FM translators is contained in the *Further Notice of Proposed Rule Making* in MM Docket No. 86-112, 3 FCC Rcd 2202 (1988).

[62] Temple, La Tour, CBS, and St. Clair.

[63] NAB, NPR, London Bridge, KASI, TBA, and Radio One.

[64] *See* 47 CFR §74.502 and §74.1231(b). These frequencies are primarily available for aural intercity relay and studio transmitter links (STL) usage, but are allowed to be used on a secondary basis by FM booster stations and NCE FM translator stations owned and operated by the primary station.

[65] We previously proposed to permit the use of broadcast auxiliary frequencies by all NCE FM translators. *See Notice of Proposed Rule Making* in MM Docket No. 86-112, 104 FCC 2d 318 (1986), and *Further Notice of Proposed Rule Making* in MM Docket No. 86-112, *supra*.

[66] NPR, CBS, Family Stations, Greater Media, Fuller-Jeffrey Broadcasting Companies and Lotus would permit at least limited use of these frequencies; NAB opposes the proposal.

[67] In particular, NPR would allow auxiliary frequency use when (1) the applicant is an FM radio broadcast station located a specified distance from the translator; (2) the frequencies are limited to 18.76-18.62 and 19.10-19.60 GHz; (3) prior coordination with local frequency coordination committees has been effected; and (4) the Commission provides for prompt cessation of translator use upon request of a local broadcaster showing no other frequency is available.

[68] For fill-in translators, Greater Media would authorize the use of auxiliary frequencies only within the theoretical coverage contour of the primary station. Where the translator is providing service to an unserved community, this commenter suggests that the transmission path be limited to 100 miles to prevent translators from serving areas far from the primary station.

[69] Authorization on a secondary basis would mean that broadcast auxiliary channels could be used to deliver signals to FM translators only where such use would not interfere with or preclude the use of those channels by aural broadcast stations.

[70] 47 CFR §74.1231(b) and (c).

[71] VAB and NCAB, Greater Pacific Radio One, NPR, London Bridge, Greater Media, KRXV, NHAB, WTSL and TBA.

[72] 47 CFR §74.1232(b).

[73] 47 U.S.C. §309(i). Authority to use lotteries was conferred on the Commission by the Communications Amendments Act of 1982, Pub. L. 97-259, 96 Stat. 1087 (1982).

[74] TBA and La Tour favor the use of lotteries; NAB, NPR (reply), and Seven Ranges Radio oppose the use of lotteries.

[75] NAB, NPR, Seven Ranges Radio and NTA.

[76] *See* paragraph 86, below.

[77] *See* BC Docket No. 80-130, 90 FCC 2d 88 (1982). The Commission employs four criteria to compare proposals to amend the FM Table of Allotments. These criteria are: 1) first full-time aural service; 2) second full-time aural service; 3) first local service; and 4) other public interest matters. Consideration of "other public interest matters" includes the number of aural services received in the proposed service area, the number of local services, the need for or lack of public radio service and other matters such as the relative size of the proposed communities and their growth rate. We propose to employ these criteria to evaluate mutually exclusive applications for FM translator stations, with the exception of the "local service" criterion. Since FM translators have no program origination authority, we will not consider whether an applicant will be providing a local service. Thus, we will not consider criterion three, and "the number of local services" will not be considered as one of the "other public interest matters."

[78] 47 CFR §73.3573(a)(1). As long as the community or area of service (some translator stations are licensed to rural areas with no defined communities) which was initially served continues to be served, and there is only an incidental expansion of service, a proposed modification has been interpreted as a "minor" change.

[79] This percentage cut-off to define a "major change" in area of coverage was first set forth in *Ted Tucker and Jana Tucker*, 4 FCC Rcd 2816 (1989) (*San Manuel, AZ*).

[80] *See* 47 CFR §73.3555.

[81] *See First Report and Order* in MM Docket No. 87-7, 4 FCC Rcd 1723 (1989). Under the modified radio contour overlap rules, the Commission redefined the "principal city contour," the area where the majority of a station's listeners are located. Under the revised rules, common ownership of two or more commercial stations in the same broadcast service is prohibited if their principal city contours overlap -- *i.e.*, a 5 mV/m contour for AM stations and a 3.16 mV/m contour for FM stations. Although the new rules continue to prohibit common ownership of two AM or two FM stations in the same community of license, they now permit dual ownership in some cases within the same ADI market. The revised rules are set forth at 47 CFR §73.3555(a)(1) and (2).

[82] Our requirement that technical need be demonstrated where more than one translator authorization is desired to serve the same area also obviates the need to apply the contour overlap rules to FM translators.

[83] 47 CFR §74.1284(c).

[84] Craver, Family Stations, CBS, La Tour, NTA, MHS (reply), Tribune Broadcasting (reply), the Rutherford Group (reply), Latto, St. Clair, Elving, and KNKK.

[85] *See Notice of Inquiry* in MM Docket No. 87-267, *supra*. As a result, the Commission has initiated a number of rule making proceedings. *See, e.g., Notice of Proposed Rule Making* in MM Docket No. 89-46 (Policies to Encourage Interference Reduction Between AM Broadcast Stations), 4 FCC Rcd 2430 (1989); *Report and Order* in MM Docket No. 88-376 (Amendment of the Commission's Rules to Improve the Quality of the AM Broadcast Service by Reducing Adjacent Channel Interference and by Eliminating Restrictions Pertaining to the Protected Daytime Contour), 4 FCC Rcd 3835 (1989).

[86] 47 CFR §74.1202(b)(1) and (2).

[87] NAB, Latto, KASI, TBA, Greater Media, CBS, NTA, and the Association of Maximum Service Telecasters, Inc. (MST).

[88] NTA, St. Clair, MHS (reply), the Rutherford Group (reply), Columbia Bible College Broadcasting Company (CBCBC), Hammett & Edison, consulting engineers (H&E), Seven Ranges Radio, Temple, NewCity, La Tour, Craver and Quinn. Quinn asserts that low power FM stations should be allowed to operate on any technically available frequency in the FM band (88.1-107.9 MHz) and that Class D stations should be allowed to operate commercially from 92.1-107.9 MHz.

[89] 20 Rad. Reg. 2d (P&F) at 1540.

[90] *See Report and Order* in BC Docket No. 80-90, *supra*.

[91] While a number of parties have petitioned for waiver, in general we have not found the submitted showings of preclusion studies -- *i.e.*, that absolutely no class A channels are available for use -- sufficient to grant these requests. *See, e.g.*, Translator File No. BPFT-860424TC (Tooele, UT), application for use of Channel 255, dismissed May 15, 1987, reconsideration pending.

[92] 47 CFR §74.1235(a).

[93] NAB suggests that where antenna heights exceed 30 meters, the FM translator should be required to reduce power for "equivalent coverage" at permissible facilities.

[94] It adds that if any combination of ERP or HAAT would cause the 1 mV/m contour to extend beyond 5 km, then a map should be required to be filed with the translator application.

[95] St. Clair, La Tour, MHS and Quinn.

[96] For example, 1 and 10 watt translators using omnidirectional antennas at a height of 100 feet can provide service to areas with radii of approximately 1.8 km and 3.25 km, respectively. However, most existing translators employ directional antennas and are located on higher ground, thus allowing service to larger geographic areas. Translators with 1 and 10

watts power output that operate in such situations can serve areas between 16 km and 32 km, respectively, from the transmitter site.

[97] *See* paragraph 18, *supra*.

[98] Additionally, translators in the border area within 320 kilometers of either the Canadian or Mexican border are subject to further limits, regardless of their location relative to the primary station. We note that under the "U.S.-Mexican FM Broadcast Agreement of 1972," such FM translators may not be authorized with a transmitter output power in excess of 10 watts and they are also subject to the spacing requirements that were formerly imposed on U.S. Class D stations as shown in Section 73.207, Table C, of the Commission's rules. Furthermore, under the "U.S. Canadian Working Arrangement of 1984," FM translator stations may not be authorized with an ERP in excess of 50 watts in any direction. Proposed new rules are being added to advise applicants of these restrictions.

[99] An ERP of 1 kW at 77 meters derives a 1 mV/m contour at 16 km based upon the FCC FM (50,50) chart. We note that if we adopt the proposed coverage area and ERP limitations, it is likely that virtually all the translators currently in operation will fall within the acceptable limits.

[100] *See Report and Order* in Gen. Docket No. 87-551, 54 Fed. Reg. 1177 (1989), 54 Fed. Reg. 30548 (1989), 3 FCC Rcd 7332 (1988), and 4 FCC Rcd 1761 (1989).

[101] 47 CFR §74.1235.

[102] 47 CFR §74.1235.

[103] *See Report and Order* in MM Docket No. 87-121, 4 FCC Rcd 1681 (1989).

[104] *See* 47 CFR §74.1203(a)-(d).

[105] Although Section 74.1203(b) states that "[i]nterference will be considered to occur whenever reception of a regularly used off-the-air signal by viewers or listeners is impaired by the signals radiated by the translator, regardless of the quality of such reception," the rules do not prescribe a specific method for calculating interference among first, second and third adjacent channel users. In practice, because FM translators, like NCE FM stations, are assigned based on a showing that a proposed facility will not cause interference to any station, the staff uses the specific contour computations and ratios of undesired to desired signal strengths prescribed in Section 73.509 of the Rules to estimate the potential for interference by FM translators. *See* 47 CFR §73.509.

[106] Section 73.207 sets forth the minimum separations standards between classes of FM stations. *See* 47 CFR §73.207.

[107] 47 CFR §73.509.

[108] KRXV, H&E, Craver, TBA, Temple, Seven Ranges Radio, Family Stations, TBA and Scripps Howard.

[109] *See* 47 CFR §74.703. NPR would additionally require applicants for new translator stations to demonstrate that there would be no prohibited contour overlap with existing FM radio broadcast or translator stations. St. Clair opposes this recommendation, arguing that any requirement for contour calculations or complex engineering studies would be unreasonably burdensome for translator station applicants, given that only 15 to 20 interference complaints are received by the Commission each year.

[110] *See Report and Order* in MM Docket No. 87-13, *supra*.

[111] We note that the principal advantages of using separation requirements to predict interference are the simplicity of administration (on a "go-no go") basis, and the production of a more even distribution of assignments. However, we believe that these advantages are outweighed by the failure of distance separations criteria to account for variations in the height of terrain.

[112] NPR, Family Stations and CBCBC.

[113] *See* 47 CFR §73.525.

[114] *See* 47 CFR §73.525(e).

[115] *See Report and Order* in MM Docket No. 87-13, *supra*.

[116] 47 CFR Section 73.682(a)(14).

[117] Upon adoption of the NOI, we imposed a freeze on applications for commercial FM translators. *See* 3 FCC Rcd at 3673. Applications for new NCE FM translators seeking assignment to the reserved frequency band were exempt from the freeze in order to permit implementation of the revised noncommercial signal delivery technology rule. *See Report and Order* in MM Docket No. 86-112, *supra*. We took this action because of our concern that the volume of applications for FM translators could increase substantially during the pendency of this proceeding. We believed that this could happen because parties anticipated that we might eventually permit these stations to readily convert from a rebroadcast service to stations authorized to originate programming. We believed that a freeze on the acceptance of applications for new commercial FM translators, or major changes to existing commercial FM translator stations, would prevent our resources from being overburdened and eliminate the possibility of conflict with any policy changes we might ultimately adopt.

[118] For the same reasons, we conclude that it is appropriate to continue the freeze on the acceptance of applications for new commercial FM translators, or major changes to existing commercial FM translator stations, until we complete this proceeding. *See NOI* at para. 62.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-267

In the Matter of

Review of the Technical Assignment
Criteria for the AM Broadcast
Service

ORDER

Adopted: March 29, 1990; Released: March 29, 1990

By the Commission:

1. The current rules governing assignment of AM broadcast stations have remained essentially the same for two decades. The Commission, recognizing problems confronting AM licensees, has begun a process to improve the AM service.

2. We intend to issue shortly a *Notice of Proposed Rule Making* that will consider many fundamental issues affecting the AM service including the expansion of the AM band from 1605 to 1705 kHz. We believe that an undertaking of such magnitude requires a partial halt to our acceptance of AM broadcast applications. This step is essential so that we may avoid compounding present difficulties with a continuing flow of new assignments based upon existing, possibly inadequate, standards. We believe, however, that we should continue to process those applications currently on file and certain defined categories of new applications for which there are strong public interest considerations. We also find that there should be a brief period prior to the freeze becoming effective in which those with applications almost ready for filing can complete and file their documents. For this reason we conclude that the freeze should become effective at the close of business on April 5, 1990.

3. Accordingly, IT IS ORDERED, that effective at the close of business on April 5, 1990, applications for new AM broadcast stations or for changes in the facilities of existing stations, if otherwise acceptable under Commission rules, will be accepted for filing only in the following categories:

(1) Applications mutually exclusive with renewal of license applications of existing stations.

(2) Applications, timely filed in response to cut-off notices and mutually exclusive with applications tendered for filing on or before April 5, 1990. In order to avoid possible unfairness in implementing the freeze, applications filed after April 5, 1990 and accepted under this provision will be dismissed if the applicant subsequently submits a minor amendment that eliminates the basis for the mutual exclusivity prior to or during the hearing process.

(3) Applications for minor changes necessitated by causes beyond the control of an applicant, *e.g.* unavoidable loss of a transmitter site or compliance with FAA restrictions.

Applications now pending and those falling into categories (1) - (3), above, will be processed and acted upon under rules in force prior to April 5, 1990. Until further notice, those applications tendered for filing after April 5, 1990, that do not meet the interim criteria will be returned.

4. This action is taken pursuant to authority contained in Sections 1, 4(i), 5(d), 303(c) and (r) and 309(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(d), 303(c) and (r) and 309(b). Pursuant to 5 U.S.C. § 553(d)(3) we find that a delay in the effectiveness of this freeze could substantially undermine the goals we intend to achieve thereby. Accordingly, we find good cause to make this freeze effective at the close of business on April 5, 1990.

5. For further information concerning this proceeding, contact Larry Olson, Policy and Rules Division, Mass Media Bureau, (202) 632-6955.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-189

In the Matter of

Amendment of Section 73.202(b),	RM-6904
Table of Allotments,	RM-7114
FM Broadcast Stations.	RM-7186
(Farmington, Grass Valley, Jackson and Placerville, California)	

NOTICE OF PROPOSED RULE MAKING AND ORDERS TO SHOW CAUSE

Adopted: March 16, 1990; Released: April 6, 1990

By the Chief, Allocations Branch:

1. Before the Commission for consideration are three separately-filed petitions for rule making which are either mutually exclusive or in some manner interrelated. Thus, they are considered in this consolidated *Notice* since they cannot be accommodated separately in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules. The first petition was filed on behalf of Denise Neubauer ("Neubauer") (RM-6904), requesting the allotment of Channel 258A to Placerville, California, as that community's second local FM broadcast service. The second petition was filed by Eric R. Hilding ("Hilding")[1] (RM-7114), seeking the allotment of Channel 232A to Farmington, California, as that community's first local broadcast service. In order to accommodate the latter proposal, Hilding requests the substitution of Channel 259A for Channel 232A at Jackson,[2] California, and modification of the Class A license of Gold Country Communications, Inc. for Station KNGT(FM)[3] accordingly. The third petition, filed on behalf of Gold Country Communications, Inc. ("GCC") (RM-7186), licensee of Station KNGT(FM), Channel 232A, Jackson, California, seeks the substitution of Channel 232B1 for Channel 232A at Jackson and modification of the license accordingly. In order to accommodate its proposal, GCC seeks the substitution of Channel 231A for Channel 232A at Grass Valley, California, licensed to Nevada County Broadcasters ("NCB") for Station KNCO-FM and modification of its license.[4] Each proponent stated an intention to apply for their requested channel, if allotted.

2. In support of the various proposals, Neubauer states that adoption of the Placerville (population 6,739)[5] proposal would provide that community with its second local FM service. Hilding asserts that an FM station at Farmington could provide essential information to motorists on Highway 4, particularly during the winter season. Hilding also states that significant growth has occurred west of Farmington in the direction of Stockton. While the current growth in the Stockton area demands added sources of programming diversity, Hilding believes that the only opportunity for such new service can be accomplished from a new FM station at Farmington. GCC avers that while it presently provides service to 25,193 people, its modification proposal at Jackson could provide a gain in service to an additional 46,436 people, representing a stated increase of 184 per cent.

3. A study of the above proposals reveals that we cannot accommodate all three as requested. The Placerville proposal (Channel 258A) is mutually exclusive with Hilding's proposal to substitute Channel 259A for Channel 232A at Jackson to accommodate the Farmington proposal. The communities are 39 kilometers apart whereas a distance of 64 kilometers is required between first adjacent Class A allotments.[6] The Farmington proposal (Channel 232A) is mutually exclusive with GCC's modification proposal to substitute Channel 232B1 for Channel 232A at Jackson, California. The communities are 63 kilometers apart whereas 143 kilometers is required between Class A and B1 co-channels.[7] Although the proposals at Grass Valley (Channel 231A), Jackson (Channel 232B1) and Placerville (Channel 258A) are compatible, the latter two must be comparatively considered with the Farmington proposal (Channel 232A), unless alternate channels can be found.

4. In light of the above, three optional allotment plans must be considered. Under Option I, Channel 258A can be allotted to Placerville, California, in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is located at least 4.4 kilometers (2.7 miles) south[8] of the community to avoid short-spacing to an application for modification of construction permit (BMPH-890510IF) for Channel 257A, at Grass Valley, California.[9] Under Option II, Channel 232A can be allotted to Farmington with a site restriction 2.1 kilometers (1.3 miles) north of the community[10] if Channel 259A is substituted for Channel 232A at Jackson. The latter substitution can be made at the current site of Station KNGT(FM).[11] Under Option III, Channel 232B1 can be substituted for Channel 232A at Jackson, as requested by GCC, with a site restriction 17.2 kilometers (10.7 miles) east[12] of the community. Channel 231A can be substituted for Channel 232A at Grass Valley at the present site of Station KNCO-FM.[13] Channel 258A at Placerville is compatible with GCC's proposal (Option III).

5. Section 307(b) of the Communications Act of 1934, as amended, mandates that the Commission fairly, equitably, and efficiently distribute frequencies " . . . among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to demonstrate its status. Farmington is not listed in the U.S. Census. Moreover, based on the information provided by Hilding, we cannot determine Farmington's status at this time. Therefore, Hilding should present the Commission with sufficient information to demonstrate that Farmington is incorporated, or that it has social, economic, cultural, or governmental indicia to qualify it as a "community" for allotment purposes. *See, e.g., Ansley, Alabama*, 46 Fed. Reg. 58688, published December 3, 1981, *Cascade Village, Colorado*, 48 Fed. Reg. 19917, May 3, 1983; *Ellwood, California*, 50 Fed. Reg. 13031, published April 2, 1985.

6. In view of the mutual exclusivity discussed *supra*, we shall provide the proponents an opportunity to demonstrate in comments why their community should be pre-

ferred. In this regard, the parties should be guided by the allotment criteria set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). Additionally, the proponents may wish to determine if other channels may be available to resolve the existing conflict.

7. We shall optionally propose to allot Channel 258A to Placerville, and to substitute Channel 232B1 for Channel 232A at Jackson with the related substitution of Channel 231A for Channel 232A at Grass Valley, or to allot Channel 232A at Farmington with the related substitution of Channel 259A for Channel 232A at Jackson. Additionally, we shall propose to modify the licenses of Station KNGT(FM), and Station KNCO-FM, as requested.

8. In light of the above, we are also issuing a *Show Cause Order* to Gold Country Communications, Inc., licensee of Station KNGT(FM), Jackson, California, seeking comments why its license should not be modified to specify operation on Channel 259A in lieu of Channel 232A, as requested by the Farmington proponent in the event the Farmington proposal prevails. We are also issuing an *Order to Show Cause* to Nevada County Broadcasters, licensee of Station KNCO-FM, Grass Valley, California, seeking comments why its license should not be modified to specify operation on Channel 231A in lieu of Channel 232A, as requested by Gold Country Communications, in the event Channel 232B1 is allotted to Jackson as a result of our comparative analysis. Commission policy requires reimbursement to Station KNGT(FM) or to Station KNCO-FM for the reasonable costs of changing their frequency. The Farmington proponent and GCC have stated their willingness to do so.

9. In view of the above, the Commission believes it is appropriate to solicit comments on the optional proposals to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

	Channel No.	
City	Present	Proposed
	OPTION I	
Placerville, California	221A	221A, 258A
	OPTION II	
Farmington, California	--	232A
Jackson, California	232A	259A
	OPTION III	
Grass Valley, California	232A	231A
Jackson, California	232A	232B1
Placerville, California	221A	221A, 258A

10. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Gold Country Communications, Inc., licensee of Station KNGT(FM), Jackson, California, and Nevada County Broadcasters, licensee of Station KNCO-FM, Grass Valley, California, SHALL SHOW CAUSE why their licenses should not be modified to specify operation on Channel 259A in lieu of Channel 232A, and Channel 231A in lieu of Channel 232A, respectively.

11. Pursuant to Section 1.87 of the Commission's Rules, Gold Country Communications, Inc. and Nevada County Broadcasters may, not later than **May 29, 1990,** file a written statement showing with particularity why their licenses should not be modified as proposed in the *Orders to Show Cause*. The Commission may call on Gold Country Communications, Inc. or Nevada County Broadcasters to furnish additional information. If Gold Country Communications, Inc. or Nevada County Broadcasters raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Gold Country Communications, Inc. and/or Nevada County Broadcasters will be deemed to have consented to the modification as proposed in the *Orders to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modifications are ultimately found to be in the public interest.

12. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice of Proposed Rule Making and Order to Show Cause* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the licensee of Station KNGT(FM) and Station KNCO-FM, respectively, as follows: Gold Country Communications, Inc., Box 833, Jackson, California 95642 and Nevada County Broadcasters, 212 W. Main St., Grass Valley, California 95945.

13. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

14. Interested parties may file comments on or before **May 29, 1990,** and reply comments on or before **June 13, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners or their counsel, as follows:

Denise Neubauer
1078 South Gale Road
Davison, MI 48423
(Petitioner - Placerville, CA)

Eric R. Hilding
c/o Hilding Communications
P.O. Box 1700
Morgan Hill, CA 95038-1700
(Petitioner - Farmington, CA)

Peter A. Casciato, Esq.
Law Offices of Peter A. Casciato
1500 Sansome Street
Suite 201
San Francisco, CA 94111
(Counsel for Gold Country
Communications, Inc. - Jackson, CA)

15. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

16. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Although Hilding indicates that he is petitioning jointly with Miklos Benedek, only Hilding signed the petition. Moreover, although Hilding indicates that he is the "authorized consultant" for Benedek, in light of the provisions of Section 1.52 of the Commission's Rules, we will consider Hilding the sole petitioner. *See also Attorney Signature Requirements*, 58 RR 2d 130 (1985).

[2] Although Hilding was the proponent of a rule making proposal to allot Channel 259A to Mokelumne Hill, CA, he requests its deletion in favor of its use at Jackson to accommodate the Farmington proposal. However, in light of our recent denial of the Mokelumne Hill proposal, that aspect of Hilding's petition is moot. *See Mokelumne Hill, CA,* 4 FCC Rcd 7108 (1989).

[3] Hilding failed to indicate compliance with Section 1.401(d) of the Commission's Rules, which requires service of his proposal on the Jackson station. Therefore, Hilding should indicate in comments whether, in fact, he did comply with this requirement, and, if not, why his proposal should be considered further in this proceeding.

[4] GCC failed to indicate compliance with Section 1.401(d) of the Commission's Rules regarding service of its proposal on Station KNCO-FM at Grass Valley. Therefore, GCC should indicate in comments whether it did, in fact, abide by the service requirement of the Commission's Rules, and, if not, why its proposal should be considered further in this proceeding.

[5] Population figure was taken from the 1980 U.S. Census.

[6] Because both of these petitions were filed before October 2, 1989, distance computations are based on the minimum spacings set forth in Section 73.213(c)(1) of the Commission's Rules. *See* 47 CFR § 73.213(c).

[7] Because the Jackson petition was filed after October 1, 1989, the required minimum distance separation for proposed Channel 232B1 at Jackson is based on revised Section 73.207(b) of the Commission's Rules, which became effective October 2, 1989. *See* 47 CFR § 73.213(c).

[8] Reference coordinates at the restricted site are 38-41-11 and 120-47-18.

[9] Coordinates specified in the modification application for Channel 257A at Grass Valley, California, are 39-14-47 and 120-57-48.

[10] Coordinates used for Channel 232A at Farmington are 37-57-00 and 121-00-00.

[11] Coordinates used in this determination are 38-20-24 and 120-43-13.

[12] Coordinates at the restricted site are 38-24-44 and 120-35-32.

[13] Coordinates at the licensed site of Station KNCO-FM are 39-14-44 and 120-57-52. This aspect of GCC's proposal is contingent upon the grant of authority to Station KRCT(FM), Channel 230B1, South Lake Tahoe, CA, to modify its facilities to specify operation on Channel 230A at coordinates 38-57-38 and 119-56-31.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-188

In the Matter of

Amendment of Section 73.202(b), RM-7104
Table of Allotments,
FM Broadcast Stations.
(Patterson, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 16, 1990; Released: April 6, 1990

By the Chief, Allocations Branch:

1. A petition for rule making has been filed by Eric R. Hilding (petitioner) seeking the allotment of FM Channel 246A to Patterson, California, as that community's second local FM broadcast service. Petitioner stated his intention to apply for the channel if allotted.

2. A staff engineering review has determined that Channel 246A can be allotted to Patterson consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is sited at least 8.9 kilometers (5.5 miles) west[1] of the community to avoid short-spacing to Station KABX-FM, Channel 248B, Merced, California.[2]

3. In view of the fact that Patterson could receive a second local FM service, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Patterson, California	226B	226B, 246A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 29, 1990,** and reply comments on or before **June 13, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Eric R. Hilding
P.O. Box 1700
Morgan Hill, CA 95038-1700

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Coordinates for this proposal are 37-29-19 and 121-13-37.

[2] Coordinates at the licensed site of Station KABX-FM are 37-22-31 and 120-27-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-187

In the Matter of

Amendment of Section 73.202(b), RM-7088
Table of Allotments,
FM Broadcast Stations.
(Windsor, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 16, 1990; Released: April 6, 1990

By the Chief, Allocations Branch:

1. A petition for rule making has been filed by Eric R. Hilding (petitioner) seeking the allotment of FM Channel 265A to Windsor, California, as that community's first local FM broadcast service. Petitioner stated his intention to apply for the channel if allotted.

2. A staff engineering review has determined that Channel 265A can be allotted to Windsor consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules,[1] in conjunction with the proposed substitution of Channel 264A for Channel 265A at San Rafael, California.[2]

3. In view of the fact that Windsor could receive a first local FM broadcast service, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Windsor, California	--	265A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 29, 1990,** and reply comments on or before **June 13, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Eric R. Hilding
P.O. Box 1700
Morgan Hill, CA 95038-1700

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Coordinates for this proposal are 38-32-48 and 122-49-00.

[2] The proposed allotment of Channel 265A at Windsor conflicts with the current operation of Station KTID-FM, Channel 265A, San Rafael, California, That station, licensed to Marin Broadcasting Company, Inc., is at coordinates 37-58-49 and 122-31-39. Therefore, this proceeding is contingent on favorable action on a request to operate Station KTID-FM on Channel 264A at San Rafael, at coordinates 37-59-25 and 122-29-58, as proposed in MM Docket No. 89-86.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-186

In the Matter of

Amendment of Section 73.202(b), RM-7105
Table of Allotments,
FM Broadcast Stations.
(Merced, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 16, 1990; Released: April 6, 1990

By the Chief, Allocations Branch:

1. A petition for rule making has been filed by Eric R. Hilding (petitioner) seeking the allotment of FM Channel 231A to Merced, California, as that community's fifth local FM service. Petitioner stated his intention to apply for the channel if allotted.

2. A staff engineering analysis has determined that Channel 231A can be allotted to Merced in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is located at least 6.9 kilometers (4.7 miles) southeast[1] of the community to avoid short-spacing to Channel 230A, Modesto, California,[2] for which applications are pending.[3]

3. In view of the fact that Merced could receive an additional local FM service, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Merced, California	248B, 268B, 292A, 299A	231A, 248B, 268B, 292A, 299A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 29, 1990,** and reply comments on or before **June 13, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Eric R. Hilding
P.O. Box 1700
Morgan Hill, CA 95038-1700

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the

channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

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FOOTNOTES

[1] Coordinates for Channel 231A at Merced are 37-16-20 and 120-24-45.

[2] Coordinates for Channel 230A at Modesto are 37-38-36 and 121-00-06.

[3] The site restriction placed on proposed Channel 231A at Merced also meets the minimum distance separation requirements to each of the fourteen applications pending for Channel 230A at Modesto, CA.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-185

In the Matter of

Amendment of Section 73.202(b), RM-7137
Table of Allotments,
FM Broadcast Stations.
(Chico, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 16, 1990; Released: April 6, 1990

By the Chief, Allocations Branch:

1. A petition for rule making has been filed by Eric R. Hilding (petitioner) seeking the allotment of FM Channel 296A[1] to Chico, California, as that community's third local FM service. Petitioner stated his intention to apply for the channel if allotted.

2. A staff engineering analysis has determined that Channel 296A can be allotted to Chico in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is located at least 3.9 kilometers (2.4 miles) northeast[2] of the community to avoid short-spacing to Station KTMX(FM), Channel 298B, Colusa, California.[3]

3. In view of the fact that Chico could receive an additional local FM service, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Chico, California	230B1, 236B	230B1, 236B, 296A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 29, 1990,** and reply comments on or before **June 13, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Eric R. Hilding
P.O. Box 1700
Morgan Hill, CA 95038-1700

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
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APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the

channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Although petitioner requested Channel 295A at Chico, his technical engineering study in support of the proposal is based on the requested allotment of Channel 296A. We have determined that Channel 295A is technically defective. Therefore, we believe that petitioner did, in fact, intend to request the allotment of Channel 296A at Chico, which complies with the Commission's Rules.

[2] Coordinates for Channel 296A at Chico are 39-45-36 and 121-48-42.

[3] Coordinates at the licensed site of Station KTMX(FM) are 39-17-17 and 122-20-02.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-582

In the Matter of

Amendment of Section 73.202(b), RM-7066
Table of Allotments,
FM Broadcast Stations.
(Archbold, Ohio)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 14, 1990; Released: April 6, 1990

By the Chief, Allocations Branch:

1. At the request of Nobco, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 8700 (1989), proposing the substitution of Channel 241A for Channel 240A at Archbold, Ohio, and the modification of its license for Station WMTR-FM to specify the alternate Class A channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. Petitioner also filed supplemental comments and a request for expedited consideration. No other comments were received.

2. Channel 241A can be allotted to Archbold in compliance with the Commission's minimum distance separation requirements and can be used at the station's present transmitter site.[1] Canadian concurrence in the allotment has been received since Archbold is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. We believe the public interest would be served by substituting Channel 241A for Channel 240A at Archbold, Ohio, since it could enable Station WMTR-FM to increase power beyond its present 3 kilowatts. As proposed, we are also modifying the license of Station WMTR-FM to specify Channel 241A. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 21, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Archbold, Ohio	241A

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WMTR-FM, Archbold, Ohio, IS MODIFIED to specify operation on Channel 241A in lieu of Channel 240A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WMTR-FM's license, BLH-890113KF, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-890113KF, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 41-33-29 and West Longitude 84-11-08.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-1
Phase II

In the Matter of

Annual 1988 Access
Tariff Filings

GTE Operating Companies

ORDER

Adopted: February 23, 1990; Released: March 28, 1990

By the Commission:

1. On December 27, 1988, the Commission issued an Order[1] resolving most of the issues in this investigation. The Commission subsequently modified that Order in response to several petitions for reconsideration.[2]

2. The *December 27 Order* concluded that the GTE Operating Companies (GTOCs) had applied an incorrect interpretation of our jurisdictional separations rules in computing circuit equipment revenue requirements.[3] Section 36.126 of the Separations Manual, 47 C.F.R. § 36.126, requires that the interexchange circuit equipment included in Central Office Equipment (COE) Category 4.23, All Other Interexchange Circuit Equipment, investment be divided into four subcategories on the basis of a count of terminations. The investment attributable to the interstate private line subcategory is directly assigned to the interstate jurisdiction and included in the special access revenue requirement.[4] The investment attributable to the joint message subcategory is allocated between jurisdictions on the basis of conversation minutes. The interstate portion of that subcategory is included in the transport revenue requirement.[5] The Commission found that the GTOCs had allocated COE 4.23 investment to subcategories on the basis of end terminations, but that the applicable separations rule required an allocation based on total terminations, including intermediate terminations.[6]

3. The result of this allocation error was that the GTOCs developed certain special access and local transport revenue requirements incorrectly. The record at the time of the *December 27 Order*, however, was not sufficiently detailed to enable us to calculate the effect of the GTOCs' errors precisely. Therefore, the Commission ordered the GTOCs to submit certain data which would allow us to make such calculations.[7] The GTOCs submitted that information on January 6, 1989.

4. We have used the additional data to determine the effect of the GTOCs' miscalculations, at the tariff level of aggregation, for all GTOC Tier 1 study areas. First, we calculated the amount by which the GTOCs miscalculated the gross plant allocated to each study area's local transport and special access elements, due to misapplication of Section 36.126(e)(3)(i) of the Rules, 47 C.F.R. § 36.126(e)(3)(i). *See* Appendix 1-A. Second, we determined the amount of excess revenues caused by the misallocations for each tariff entity. *See* Appendix 2. The remaining issue is what action we shall take on the basis of this evidence.

5. This proceeding has been a narrowly focused investigation of certain misapplications of this Commission's rules which we encountered in the tariff review process relating to the Annual 1988 Access Tariff Filings. The proceeding was initiated under Section 204(a) of the Act, 47 U.S.C. § 204(a), which grants this Commission discretion in fashioning appropriate remedies in the public interest, including refunds where a charge is found not justified.[8] We choose to exercise that discretion here by ordering refunds only in situations in which a carrier's rate calculation error ultimately resulted in earnings during the relevant period that exceeded the prescribed return the carrier used to develop the rates.[9] As in the *Reconsideration Order*, we have also decided not to take action regarding errors that were not associated with rate increases.[10] Finally, we conclude, as the Commission did in the *Reconsideration Order*, that the absence of an accounting order in connection with the GTOCs' rates poses no bar to the ordering of refunds.[11]

6. Accordingly, we screen out instances in which the GTOCs' errors did not result in realized overearnings for the period in question. *See* Appendix 3. We also screen out rates in which incorrect special access revenue requirements were calculated as a result of the GTOCs' rate development errors.[12] Based on these adjustments we find refunds totalling $1,010,663 are warranted for GTE Operating Companies in Ohio and California, as specified in Appendix 1.

7. IT IS THEREFORE ORDERED that within 30 days of release of this Order, the GTOCs make the refunds set forth in Appendix 1 to interstate customers on the basis of each customer's share of 1988 local transport payments.

8. IT IS FURTHER ORDERED that the investigation of the 1988 Access Tariff Filings, CC Docket No. 88-1, IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase II, Memorandum Opinion and Order, 4 FCC Rcd 4115 (1989) (*December 27 Order*).

[2] Annual 1988 Access Tariff Filings, Memorandum Opinion and Order on Reconsideration, CC Docket No. 88-1, Phase II, 4 FCC Rcd 3965 (1989) (*Reconsideration Order*), *further recon. denied*, FCC 89-290, adopted Oct. 13, 1989. Appeals of the *December 27 Order* and the various related orders have been filed. *See* Southern Bell Telephone & Telegraph Co. v. FCC, No. 89-1081 (D.C. Cir. filed Feb. 2, 1989).

[3] *December 27 Order*, 4 FCC Rcd at 4126.

[4] Section 69.113 of this Commission's Rules, 47 C.F.R. § 69.113.

[5] Section 69.111 of this Commission's Rules, 47 C.F.R. § 69.111.

[6] *See* Amendment of Part 67 of the Commission's Rules and establishment of a Joint Board, CC Docket No. 80-286, Recommended Decision and Order, 2 FCC Rcd 2551, 2566-67 (1987); *see also* MTS and WATS Market Structure, CC Docket Nos. 78-72, 80-286, and 86-297, Order On Reconsideration and Supplemental Notice of Proposed Rule Making, 3 FCC Rcd 5518, 5520-21 (1988).

[7] *December 27 Order*, 4 FCC Rcd at 4126-27.

[8] Section 204(a) provides that "upon completion of the hearing and decision [the Commission] may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or increased charges as by its decision shall be found to be not justified."

[9] This exercise of our discretion is not inconsistent with prior directions in this docket. In the *Reconsideration Order*, 4 FCC Rcd 3967 (para. 24), for example, the Commission stated that "a finding that a component of the revenue requirement has been overstated does not inevitably lead to the conclusion that the resulting rate is unjust and unreasonable." In that Order, the Commission also stated that we were open to evidence of the actual earnings performance of the rates under investigation. *Id. See also December 27 Order*, 4 FCC Rcd at 4149 (para. 273).

[10] *See Reconsideration Order*, 4 FCC Rcd at 3966 (para. 11) ("In order to avoid possibly protracted litigation [regarding our authority under Section 204 of the Communications Act to order refunds in cases of rate decreases] we are . . . vacating the relatively insubstantial refunds that relate to . . . decreased rates."); *see also Order on Further Reconsideration*, FCC 89-290, adopted Oct. 13, 1989 (para. 10). This decision to exclude reduced rates from our refund calculations here does not foreclose Section 208 complaints to recover any overcharges that may be related to such rates. *See Reconsideration Order*, 4 FCC Rcd 3966 (para. 11).

[11] *Reconsideration Order*, 4 FCC Rcd at 3966 (para.9).

[12] We conclude that the GTOCs' special access overcharges totalling $6,807 are insignificant given the administrative costs of ordering a refund of such overcharges. In addition, since the GTOCs' Tier 2 study areas, Alaska and West Coast of California, are very small, we have excluded the impact of the GTOCs' miscalculations on these study areas, as *de minimis*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket Nos. 89-133, 135, 138, 140, 142, 148, 150, 151, 153, 156, 159-161, 165, 166, 168, 170, 175, 176, 178-180, 182, 184-186, 189-193, 195, 197-209, 213-215, 217, 219, 220, 222, 223, 228, 231-235, 237, 239-241, 243, 246, 247, 250, 251, 253, 255, 258, 260, 262, 263, 265-267, 269-273, 276, 277, 280

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Various locations)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 22, 1990; Released: April 3, 1990

By the Chief, Allocations Branch:

1. The Commission on its own motion issued the *Notice of Proposed Rule Making*, 4 FCC Rcd 5357 (1989), proposing to amend the FM Table of Allotments for 149 stations by reclassifying the station from Class A to Class C3. The *Notice* also proposed to modify each station's authorization accordingly.[1] The *Notice* specified separate docket numbers for each of the 149 proposals and stated that the proposals would be administered like routine FM allotment rule making proceedings.[2] This *Report and Order* addresses the above captioned 85 proceedings. In each of these proceedings, the relevant licensee or permittee filed comments in support of the proposal as set forth in the *Notice* and expressed an intention to construct a Class C3 facility accordingly. [3] In each of these 85 proceedings, there is no specific objection by any party to the proposed actions,[4] nor is there a valid counterproposal or other obstacle to immediate grant.

2. We believe the public interest would be served by the substitution of Class C3 channels for Class A channels at the stations listed in Appendix A since the substitution could provide expanded radio service. The Class C3 upgrades at the 85 communities can be made in compliance with the Commission's minimum distance separation requirements on the channel presently allotted to the community and at the station's present transmitter site.[5] We are herein modifying the authorizations in accordance with Section 1.420(g) of the Commission's Rules. Canadian concurrence has been received for those stations listed in Appendix A which are located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 18, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed in Appendix A.

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the licenses or permits for the stations listed in Appendix A ARE MODIFIED, to specify operation on the Class C3 co-channel in lieu of its existing Class A channel subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee or permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND, by First Class Mail, a copy of this *Order* to parties filing comments in the above-mentioned proceedings.

6. IT IS FURTHER ORDERED, That the above-captioned proceedings ARE TERMINATED.

7. For further information concerning the individual proceedings, contact the Allocations Branch, Mass Media Bureau, at (202) 634-6530, as follows: Nancy Joyner for stations in Alaska, Arizona, California, and Colorado; Nancy Walls for stations in Florida, Hawaii, and Idaho; Kathleen Scheuerle for stations in Kansas, Michigan, Minnesota, Mississippi, and Montana; Leslie Shapiro for stations in American Samoa, Nebraska, Nevada, North Dakota, Oklahoma, Oregon, South Carolina, and South Dakota; and Patricia Rawlings for stations in Louisiana, Texas, Utah, Washington, Wisconsin, and Wyoming.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] *See* Appendix B in the *Notice* for the complete listing of stations, communities, licensees and permittees.

[2] The Commission recently disposed of proceedings involving 46 of the 149 communites. *See Report and Order* in MM Docket Nos. 89-134, 139, 141, 143-147, 149, 152, 154, 155, 158, 162, 167, 169, 173, 177, 183, 187, 194, 196, 211, 212, 216, 221, 224, 225, 227, 229, 230, 236, 238, 244, 245, 248, 249, 252, 254, 256, 259, 261, 268, 274, 275, 279, adopted January 30, 1990.

[3] We have accepted late expressions of interest filed by several parties in view of the fact that no other competing proposal was advanced in the proceeding.

[4] The FAA filed comments concerning these proceedings. The Commission provided public notice of the FAA's comments on August 30, 1989. In its comments, the FAA asserts that one or more of the stations could cause harmful interference if allowed to upgrade. Pursuant to 49 USC § 1501(c) the FCC will address this matter directly with the FAA.

[5] Because these allotments are made as a result of proceedings initiated prior to October 2, 1989, permittees or licensees may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's rules. *See* 47 CFR § 73.213(c).

APPENDIX A

	Channel & Status	Call Sign	Location, Coordinates, Licensee, and Address
1.	**MM Docket No. 89-133**		
	221 LIC	KSBS FM	PAGO PAGO AS -14-17-41 170-39-44 Samoa Technologies P. O. Box 793 Pago Pago AS 96799
2.	**MM Docket No. 89-135**		
	221 LIC	KBLJ	LA JUNTA CO 37-59-15 103-34-02 La Junta Broadcasters, Inc. P.O. Box 485 La Junta CO 81050
3.	**MM Docket No. 89-138**		
	221 LIC	KRRB	DICKINSON ND 46-55-24 102-43-35 Roughrider Broadcasting Co. 129 Third Ave., East Dickinson ND 58601
4.	**MM Docket No. 89-140**		
	221 LIC	KWJY	WOODWARD OK 36-24-02 99-25-44 Dwaine T. Martin P.O. Box 1600 Woodward OK 73802
5.	**MM Docket No. 89-142**		
	224 LIC	KORT FM	GRANGEVILLE ID 45-53-05 116-06-30 4-K Radio, Inc. P.O. Box 936 Lewiston ID 83501

6. **MM Docket No. 89-148**

224 LIC KBXS ELY NV
39-14-46 114-55-39

KBXS Broadcasting, Inc.
484 Aultman St.
Ely NV 89301

7. **MM Docket No. 89-150**

224 LIC KWNA FM WINNEMUCCA NV
41-00-40 117-45-59

Sheen Broadcasting Co.
P.O. Box 591
Winnemucca NV 89445

8. **MM Docket No. 89-151**

224 LIC KKBS GUYMON OK
36-42-43 101-45-59

Panhandle Communications, Inc.
3125 Norcrest
Oklahoma City OK 73121

9. **MM Docket No. 89-153**

224 LIC KGFX FM PIERRE SD
44-22-15 100-24-17

Robert E. Ingstad, Jr.
214 W. Pleasant Dr.
Pierre SD 10225

10. **MM Docket No. 89-156**

228 LIC KXAZ PAGE AZ
36-46-42 111-25-46

Stephan G. Paranto, Temp. Custodian
91 N. 8th Avenue
Page AZ 86040

11. **MM Docket No. 89-159**

228 CP WMTO — PORT ST JOE FL; 29-49-09 85-15-34

Maryann Wetmore-Kodish
H. Scott Wetmore
5121 Ehrlich Rd Suite 101A
Tampa FL 33624

12. **MM Docket No. 89-160**

228 LIC KPOA — LAHAINA HI; 20-50-43 156-54-04

KPOA Radio, A Hawaii LTD. Partnership
685 Front Street
Lahaina Maui HI 96761

13. **MM Docket No. 89-161**

228 LIC WZRK — HANCOCK MI; 47-06-05 88-35-26

Copper Country Enterprises, Inc.
326 Qunicy St
Hancock MI 49930

14. **MM Docket No. 89-165**

228 LIC KQIK FM — LAKEVIEW OR; 42-12-18 120-19-39

KQIK, Ltd.
HC 64 Box 46
Lakeview OR 97630

15. **MM Docket No. 89-166**

228 LIC KROO — BRECKENRIDGE TX; 32-45-31 98-56-00

Breckenridge Broadcasting Company
Route 3, Box 14
Breckenridge TX 76024

16. **MM Docket No. 89-168**

232 LIC	KCRE FM	CRESCENT CITY 41-45-34	CA 124-09-49

BER-TEC Broadcasting, Inc.
P.O. Box 1089
Crescent City CA 95531

17. **MM Docket No. 89-170**

232 LIC	KADQ FM	REXBURG 43-48-56	ID 111-45-28

Ted W. Austin, Jr.
Route 1, Box 215-6
St. Anthony ID 83445

18. **MM Docket No. 89-175**

237 LIC	KLER FM	OROFINO 46-28-45	ID 116-14-15

4-K Radio, Inc.
P.O. Box 936
Lewiston ID 83501

19. **MM Docket No. 89-176**

237 LIC	KECH FM	SUN VALLEY 43-39-42	ID 114-24-07

Ketchum Radio, Inc.
P.O. Box 2158
Ketchum ID 83340

20. **MM Docket No. 89-178**

237 LIC	KQKI FM	BAYOU VISTA 29-39-28	LA 91-17-41

Teche Broadcasting Corporation
P.O. Box 847
Morgan City LA 70380

21. **MM Docket No. 89-179**

237 LIC	KKBC FM	BAKER	OR
		44-47-18	117-48-35

Grande Radio, Inc.
2510 East Cove Ave.
La Grande OR 97850

22. **MM Docket No. 89-180**

237 LIC	KURY FM	BROOKINGS	OR
		42-04-32	124-18-52

KURY Radio, Inc.
P.O. Box 1029
Brookings OR 97415

23. **MM Docket No. 89-182**

237 LIC	KMRE	DUMAS	TX
		35-51-51	101-55-45

Dumas Broadcasters, Inc.
Box 555
Dumas TX 79029

24. **MM Docket No. 89-184**

240 LIC	KINQ FM	FAIRBANKS	AK
		64-51-49	145-45-06

Great Alaska Electric Radio Company
4600 Dale Road
Fairbanks AK 79701

25. **MM Docket No. 89-185**

240 CP	KKMX FM	HAYDEN	CO
		40-31-15	107-17-46

Radio Colorado Northwest
P.O. Box QQ
Hayden CO 81639

26. **MM Docket No. 89-186**

240 LIC KBMG

HAMILTON MT
46-13-46 114-14-01

Benedict Communications LTD PRTNRSHP
P.O. Box 668
Hamilton MT 59840

27. **MM Docket No. 89-189**

240 LIC KXIT FM

DALHART TX
36-05-45 102-30-38

Dalhart Broadcasters
P.O. Box 1350
Dalhart TX 79022

28. **MM Docket No. 89-190**

240 CP KDIU

DIMMIT TX
34-35-11 102-18-35

Collins Communications Company
P.O. Box 608
Dimmit TX 79027

29. **MM Docket No. 89-191**

240 LIC KYXS FM

MINERAL WELLS TX
32-48-42 98-06-11

Jerry Snyder and Associates, Inc.
Rt.1, Radio Road
Mineral Wells TX 76067

30. **MM Docket No. 89-192**

244 LIC KWCL

OAK GROVE LA
32-51-33 91-21-26

96.7 FM Radio, Inc.
P.O. Box 4176
Monroe LA 71211

31. **MM Docket No. 89-193**

244 LIC KGVW FM

BEL GRADE MT
45-41-36 110-58-54

KGVW
2050 Amsterdam Rd.
Belgrade MT 59714

32. **MM Docket No. 89-195**

244 LIC KWDG

IDABEL OK
33-52-54 94-49-10

Idabel Broadcasting Company
P.O. Box 418
Idabel OK 74745

33. **MM Docket No. 89-197**

244 CP KOPI

MOAB UT
38-35-07 109-33-44

Barkdale and Associates
229 Walker Street
Moab UT 84532

34. **MM Docket No. 89-198**

249 LIC KSPN FM

ASPEN CO
39-13-33 106-50-00

Aspen Broadcasting Company
305L Aspen Airport Bus.
Aspen CO 81612

35. **MM Docket NO. 89-199**

249 LIC KGLM FM

ANACONDA MT
46-06-07 112-56-59

Aire/Ink Inc.
P.O. Box 772
Deer Lodge MT 59711

36. **MM Docket No. 89-200**

249 LIC KSWW

RAYMOND WA
46-41-44 123-46-16

Pacific Broadcasting Co.
P.O. Box 628
Raymond WA 98577

37. **MM Docket No. 89-201**

250 LIC KTBA

TUBA CITY AZ
36-07-54 111-14-59

Western Indian Ministries, Inc.
Drawer FF
Window Rock AZ 86515

38. **MM Docket No. 89-202**

250 LIC KPOD FM

CRESCENT NORTH CA
41-45-35 124-11-28

Let's Talk Radio, Inc.
825 Mason Hall, P.O. Box 1915
Crescent City CA 95531

39. **MM Docket No. 89-203**

250 CP KLUB

MILTON-FREEWATER OR
45-54-13 118-32-49

Nanette Markunas
P.O. Box 2576
Montauk NY 11954

40. **MM Docket No. 89-204**

251 CP WMLB

GLEN ARBOR MI
44-49-02 85-59-39

Michael E. Bradford
1873 Crouch Road
Jackson MI 49201

41. **MM Docket No. 89-205**

252	LIC	KGUC	GUNNISON 38-31-22	CO 106-54-28

Gunnison Broadcasting Co.
113 East Georgia
Gunnison CO 81230

42. **MM Docket No. 89-206**

252	CP	WCMZ FM	SAULT STE. MARIE 46-29-10	MI 84-13-49

Central Michigan University
3965 E. Broomfield Road
Mt. Pleasant MI 48859

43. **MM Docket No. 89-207**

252	LIC	KDBM FM	DILLON 45-14-22	MT 112-40-03

Beaverhead Madison Broadcasting
P.O. Box 950
Dillon MT 59725

44. **MM Docket No. 89-208**

252	CP	KIDD FM	BEND 44-04-40	OR 121-19-49

KITSAP Communications Corp.
1618 SW First Avenue, #415
Portland OR 97210

45. **MM Docket No. 89-209**

252	LIC	KFYZ FM	BONHAM 33-33-26	TX 96-13-13

Bonham Broadcasting Company
P.O. Box 248
Bonham TX 75418

46. MM Docket No. 89-213

252 LIC KARB

PRICE UT
39-36-36 110-48-52

Eastern Utah Broadcasting Company
Box 875
Price UT 84501-0875

47. MM Docket No. 89-214

252 LIC KERM

TORRINGTON WY
41-59-41 104-12-05

Kath Broadcasting, Inc.
P.O. Box 670
Torrington WY 82240

48. MM Docket No. 89-215

253 CP KCBZ

CLARKSVILLE TX
33-36-47 95-01-03

Radio Station KCAR, Inc.
P.O. Box 609
Clarksville TX 75426

49. MM Docket No. 89-217

257 LIC WIGM FM

MEDFORD WI
45-07-55 90-19-54

WIGM, Inc.
P.O. Box 59
Medford WI 54451

50. MM Docket No. 89-219

261 LIC KYKD

BETHEL AK
60-48-20 161-47-14

Arctic Broadcasting Association
P.O. Box 773527
Eagle River AK 99577

51. **MM Docket No. 89-220**

261 LIC KWHQ FM KENAI AK
60-30-49 151-11-19

KSRM, Inc.
H.C. 2 Box 852
Soldotna AK 99669

52. **MM Docket No. 89-222**

261 LIC KMMR MALTA MT
48-15-17 107-49-18

Malta Broadcasting Corp.
P.O. Box 1073
Malta MT 59538

53. **MM Docket No. 89-223**

261 LIC KZOQ MISSOULA MT
46-52-56 113-59-08

Peterson Broadcasting Company
P.O. Box 2277
Missoula MT 59806

54. **MM Docket No. 89-228**

264 LIC KRJT FM BOWIE TX
33-38-43 97-49-08

Bowie-Nocona Broadcasting Co. Inc.
Box 1080
Bowie TX 76230

55. **MM Docket No. 89-231**

265 LIC KJCO YUMA CO
40-00-32 102-45-34

CEN-TEN Productions, Inc.
804 S. Ash
Yuma CO 80759

56. **MM Docket No. 89-232**

265 LIC	KXPO FM	GRAFTON 48-23-53	ND 97-26-56

KGPC Company
P.O. Box 312
Grafton ND 58237

57. **MM Docket No. 89-233**

265 LIC	KLPR FM	VALLEY CITY 46-54-24	ND 97-58-20

Ingstad Broadcasting, Inc.
232 - 3rd St., N.E.
Valley City ND 58072

58. **MM Docket No. 89-234**

265 LIC	KFNC	SULPHUR 34-32-57	OK 96-58-34

Murray County Broadcasting, Inc.
P.O. Box 599
Sulphur OK 73086

59. **MM Docket No. 89-235**

265 LIC	KIXC FM	QUANAH 34-18-58	TX 99-44-49

Landmark Broadcasting Company
Marlin Maddoux
P.O. Box 29
Quanah TX 79252

60. **MM Docket No. 89-237**

269 LIC	KPEN FM	SOLDATNA 60-30-40	AK 151-16-12

Peninsula Communications Incorp.
Mi 1.8 Diamond Rd.
Homer AK 99603

61. **MM Docket No. 89-239**

269 LIC	KTNY	LIBBY 48-22-14	MT 115-32-19

Lincoln County Broadcasters, Inc.
Cedar & S. Main, Box 730
Libby MT 59923

62. **MM Docket No. 89-240**

269 LIC	KELY FM	ELY 39-15-52	NV 114-53-35

Reed Communications, Inc.
807 Avenue F
Ely NV 89301

63. **MM Docket No. 89-241**

269 LIC	KACA	PROSSER 46-12-05	WA 119-45-42

Cormac C. Thompson, Inc.
P.O. Box 591
Prosser WA 99350

64. **MM Docket No. 89-243**

271 CP	KBAZ	BASILE 30-28-52	LA 92-35-05

Nezpique Communications, Ltd.
P.O. Drawer 391
Eunice LA 70535-0391

65. **MM Docket No. 89-246**

272 LIC	WTKI FM	GULFPORT 30-22-28	MS 89-04-45

Holt Communications Corporation
1 Tower Park, Rt.9, Box 34
Winchester VA 22601

66. **MM Docket No. 89-247**

272 CP	KRNY	KEARNEY	NE
		40-42-35	99-05-55

Polly A. Hays
Rt.2, P.O. Box 339D
Kearney NE 68847

67. **MM Docket No. 89-250**

276 LIC	KNDY FM	MARYSVILLE	KS
		39-52-12	96-44-45

Dierking Communications, Inc.
610 N. 12th Street
Marysville KS 66508

68. **MM Docket No. 89-251**

276 LIC	WGDN FM	GLADWIN	MI
		43-57-03	84-30-34

Apple Broadcasting Company, Inc.
3601 W. Woods Rd
Gladwin MI 48624

69. **MM Docket No. 89-253**

276 LIC	KOFM	ENID	OK
		36-26-14	97-55-15

Enid Quality Broadcasting Corp.
P.O. Box 5736
Enid OK 73702

70. **MM Docket No. 89-255**

280 LIC	KSUA	COLLEGE	AK
		64-51-32	147-49-41

Student Media, Inc.
P.O. Box 83831
Fairbanks AK 99708

71. **MM Docket No. 89-258**

280 LIC KNLV FM

ORD NE
41-34-16 98-55-29

KNLV, Inc.
205 S. 16th
Ord NE 68862

72. **MM Docket No. 89-260**

280 LIC KVXO

SPOKANE WA
47-41-52 117-31-07

Pacific Metrocom Northwest, Inc.
205 Palmetto Ave. #307
Merritt Island FL 32953

73. **MM Docket No. 89-262**

285 CP KDOA

TULIA TX
34-25-45 101-45-32

Dominion Communications, Inc.
230 W. 55th St.
New York NY 10020

74. **MM Docket No. 89-263**

288 LIC KWYD FM

SECURITY CO
38-44-40 104-51-41

Optima Communications, Inc.
1608 Cocoran Street, N.W.
Washington D.C. 20009-3004

75. **MM Docket No. 89-265**

288 LIC KMAV FM

MAYVILLE ND
47-29-45 97-21-03

KMAV Radio, Inc.
P.O. Box 36 (Hwy 200 W)
Mayville ND 58257

76. MM Docket No. 89-266

292	LIC	KSUP FM	JUNEAU AK 58-18-06 134-26-29

Alaska-Juneau Communications Inc.
1107 W. 8th Street - #2
Juneau AK 99801

77. MM Docket No. 89-267

292	LIC	KRQS	PAGOSA SPRINGS CO 37-11-32 107-05-55

Pagosa Communications Inc.
702 S. Tenth Street
Pagosa Springs CO 81147

78. MM Docket No. 89-269

292	LIC	WMFG FM	HIBBING MN 47-24-30 92-57-04

DNS Broadcasting, Inc.
P.O. Box 829
Hibbing MN 55746

79. MM Docket No. 89-270

292	CP	WNMX	NEWBERRY SC 34-19-38 81-32-42

Professional Radio, Inc.
1701 Nance Street
Newberry SC 29108

80. MM Docket No. 89-271

292	LIC	KTQN	BELTON TX 31-03-46 97-31-54

Heart of Texas Communications, Ltd.
P.O. Box 240
Belton TX 76513

81. **MM Docket No. 89-272**

292 LIC	KPAN FM	HEREFORD	TX
		34-47-33	102-25-45

KPAN Broadcasters
Drawers 1757
Hereford TX 79045

82. **MM Docket No. 89-273**

292 LIC	KLEN	CHEYENNE	WY
		41-08-08	104-48-12

Blue Sky Broadcasting, Inc.
1416 Bradley Avenue
Cheyenne WY 82001

83. **MM Docket No. 89-276**

296 LIC	KWLV	MANY	LA
		31-36-36	93-23-58

WLV-TV, Incorporated
595 San Antonio Ave.
Many LA 71449

84. **MM Docket No. 89-277**

296 LIC	KKDQ	FOSSTON	MN
		47-33-44	95-43-30

North Country Radio, Inc.
P.O. Box 218
Thief River Falls MN 56701

85. **MM Docket No. 89-280**

296 LIC	KWKQ	GRAHAM	TX
		33-07-37	98-35-35

KSWA, Inc.
P.O. Box 1050
Graham TX 76046

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-11

In the Matter of

AT&T COMMUNICATIONS, INC.
Revisions to Tariff F.C.C. No. 15

Transmittal Nos. 1854 and 1883

Competitive Pricing Plan 2 -
Resort Condominiums International

MEMORANDUM OPINION AND ORDER

Adopted: January 19, 1990; Released: January 19, 1990

By the Chief, Common Carrier Bureau:

I. SUMMARY

1. By this Order, the Common Carrier Bureau initiates an investigation of AT&T's customer-specific pricing plan for Resort Condominiums International, Inc. introduced in AT&T's Tariff F.C.C. No. 15 and suspends the effectiveness of that transmittal for five months. We also designate the issues for investigation and establish a schedule for the filing of further pleadings by interested parties.

II. INTRODUCTION AND BACKGROUND

2. On October 23, 1989, AT&T Communications, Inc. (AT&T) filed Transmittal No. 1854 to introduce its second Competitive Pricing Plan (CPP2) under Tariff 15.[1] Transmittal 1854 is scheduled to become effective January 21, 1990. AT&T claims that CPP2 responds to a special off-tariff discount offered to Resort Condominiums International, Inc. (RCI) by MCI Telecommunications Corporation (MCI). MCI, National Telecommunications Network (NTN), and US Sprint Communications Company Limited Partnership (US Sprint) filed petitions to reject AT&T's transmittal. The Competitive Telecommunications Association (CompTel) and Metromedia Long Distance, Inc. and Communications Services, Inc. (MLD/CSI) filed petitions to reject or suspend and investigate.

3. The Commission has previously considered the lawfulness of an AT&T Tariff 15 offering of competitive pricing plans. In 1988, AT&T filed its first competitive pricing plan for the Holiday Corporation.[2] AT&T had developed the Holiday Rate Plan (HRP) in response to MCI's offer of discounted service to the Holiday Corporation. The Commission initiated an investigation to determine whether HRP violated Section 202(a) of the Communications Act. [3] Some parties in that proceeding argued that the provision of a substantial discount to a single named customer was unjustly and unreasonably discriminatory, in violation of Section 202(a), was not justified by competitive necessity either as a matter of law or on the facts presented by AT&T, and did not comply with the Commission's Rules or policies.[4] In the *HRP Final Order*,[5] the Commisson did not reach many of the legal and policy issues designated for investigation. The Commission found that, even assuming that the competitive necessity defense can justify a single customer offering, AT&T had failed to justify its HRP discount because the MCI offer was generally available. The Commission concluded that AT&T's plan unreasonably discriminatory and ordered AT&T to file corrective tariff revisions.

4. The instant transmittal represents AT&T's attempt to establish a single customer offering in Tariff 15 for RCI. RCI provides timeshare exchange and other travel services to one million individual members and 1500 affiliated resorts from its offices in Indianapolis, Indiana, and Wyoming, Michigan. AT&T has been the principal provider of interexchange services to RCI, handling approximately 2 million minutes of interstate traffic per month. AT&T Description and Justification at 7-8. In September 1989, RCI solicited competitive proposals to replace AT&T's services. MCI offered to serve RCI's communications requirements using a combination of its virtual private network services (Vnet) and its inbound 800-DAL service at 10 and 8 percent below its tariffed rates. MCI's proposal also included additional discounts of 1 or 2 percent for revenues above $500,000 or $1 million a month, a 10 percent underutilization penalty, and penalties for termination prior to expiration of the three-year term. *Id.* at 8.

5. According to AT&T, RCI expressly stated that it would accept MCI's proposal unless AT&T offered a substantially more competitive rate.[6] In response, AT&T developed CPP2. Under CPP2, AT&T reduces by 10 percent its inbound usage rates for Software Defined Network (SDN), including World Connect for SDN international calling, and 800 Service from Canada. AT&T also reduces its outbound usage rates by eight percent. *Id.* at 5. AT&T states that these discounts are in addition to any volume discounts that would otherwise be applicable under standard tariffs. In order to obtain the full special discount, RCI must agree to a three-year service period and a $250,000 monthly revenue commitment. Consistent with MCI's offer, AT&T's transmittal also includes an additional 1 or 2 percent discount on usage rates when monthly revenues exceed $500,000 and $1 million, respectively, and a ten percent underutilization and termination penalty. Should RCI's average monthly revenue fall below $150,000, AT&T will assess standard tariff rates without the CPP2 discounts and will include the 10 percent underutilization penalty. AT&T maintains that the rates outlined in CPP2, while below AT&T's most economical standard tariffed rates, are 3.1 percent higher than the charges contained in MCI's offer to RCI. *Id.* at 5-7. In its transmittal, AT&T also revises the general Tariff 15 regulations to state that Competitive Pricing Plans offered by AT&T in response to a competitor's off-tariff proposal will be made available to all similarly situated customers who have actually been offered that competitor's proposal. *Id.* at 2.

6. AT&T contends that its response to MCI's customer specific offer is justified under the doctrine of "competitive necessity." AT&T states that in order to establish competitive necessity, it must show that: (1) an equal or lower priced competitive alternative -- *i.e.*, a similar offering or set of offerings from other carriers -- is available to

the customer of the discounted offering; (2) the terms of the discounted offering are reasonably designed to meet that competitive alternative without undue discrimination; and (3) the discount contributes to reasonable rates and efficient services for all users. *Id.* at 9.[7] Based upon its own calculations, AT&T asserts that the rates in MCI's offer to RCI are below MCI's standard tariffed rates, AT&T's most economical standard tariffed rates, and even AT&T's proposed CPP2 rates. Thus, AT&T concludes that RCI has been offered an alternative to AT&T's services at an equal or lower rate and that it has satisfied the first element of the competitive necessity test. With regard to the second element, AT&T maintains that CPP2 is narrowly tailored to meet competition because it is available only to customers who can demonstrate that they have received a substantially similar off-tariff offer by MCI. Finally, AT&T argues that by enabling it to preserve usage and revenues that would otherwise be lost to competition, CPP2 will benefit all customers through improved earnings which can be used to cover common costs. *Id.* at 11-12.

III. PLEADINGS

A. MCI Petition to Reject

7. As a general matter, MCI believes it is unfair to allow AT&T to depart from its general tariffs whenever a non-dominant competitor is known or suspected of being in a position to capture business from AT&T, or whenever AT&T seeks to reacquire business lost to those competitors. Although the Commission's dominant carrier policy and rules continue to apply to AT&T, MCI warns that AT&T's is attempting, through its various Tariff 12, 15, and 16 filings, to circumvent those rules and, in effect, to deregulate itself. Unless or until the Commission formally changes its rules or AT&T's status under the rules, MCI argues that AT&T must abide by the current regulations, and the Commission must enforce such regulations with respect to AT&T. MCI Petition to Reject at 5-7.

8. MCI contends that CPP2 is unlawfully discriminatory and that AT&T has failed to sustain its RCI offer on competitive necessity grounds.[8] According to MCI, AT&T has ignored the Commission's requirement that a competitive response must be generally available. MCI cites the *Volume Discount Order* for the proposition that "resellers and sharers must be allowed to take a volume-discounted offering on the same terms as a single, high volume customer." AT&T has violated this requirement, MCI explains, because the RCI offer, by its terms, is available only to RCI. *Id.* at 8-9. MCI also argues that AT&T's comparison of CCP2 and the rates MCI offered RCI is misleading. MCI asserts that usage rates are not conclusive; other costs involved in the "migration" of the 100-percent AT&T customer to MCI's transmission offerings must be evaluated to determine the true price proposed. When these other costs are taken into account, MCI asserts, it is impossible to conclude that AT&T has satisfied the initial element of the competitive necessity test. MCI believes AT&T is seeking to establish so substantial a discount level for RCI that it amounts to predation. Such an offering, MCI concludes, cannot be deemed a reasonably designed competitive response. *Id.* at 10-11. In its view, AT&T's offering is not cost-based, fails to recover relevant costs, and will result in the charging of higher prices to those customers subscribing to and paying AT&T's standard SDN and 800 Service prices. If this is the case, MCI finds it difficult to comprehend how AT&T's offer will contribute to reasonable rates and efficient service for all users. *Id.* at 12.

9. Finally, MCI claims AT&T's offering violates Section 203 of the Communications Act, which obligates AT&T to tariff all material terms and conditions pertaining to its furnishing of interexchange transmission services. MCI accuses AT&T of providing 800 Services at prices and volume discounts not contained in its SDN tariff. This approach, MCI maintains, allows AT&T to target an 800 Service discount at a particular customer without any need to reduce prices for its generally available standard 800 Service. *Id.* at 12-13.

B. NTN Petition to Reject

10. NTN urges the Commission to reject AT&T's transmittal based on the established market rules developed for dominant carriers. It asks the Commission to resist AT&T's attempt to rewrite the rules applicable to dominant carriers on an *ad hoc* basis through the tariff process. NTN Petition to Reject at 2-3. NTN warns that implementation of Transmittal 1854 would prejudice the planned Commission investigation into the status of interexchange competition. It argues that AT&T should not receive the practical benefit of deregulation by virtue of this transmittal being allowed to take effect subject to investigation. NTN contends that rejection of AT&T's transmittal will not seriously prejudice AT&T or its customers. According to it, AT&T is perfectly free to implement general rate decreases to match competition, so long as those decreases comply with the price cap rules. *Id.* at 4, 12-13.

11. NTN maintains that AT&T's transmittal is nothing more than a customer-specific volume discount. It claims that AT&T's competitive pricing plan service is unreasonably discriminatory because that plan eliminates any resale of these offerings by parties other than RCI. at 8-9. NTN also argues that AT&T has failed to provide proper cost support information. According to NTN, AT&T's use of the net revenue standard violates the Commission's price cap rules. Moreover, NTN accuses AT&T of choosing a meaningless standard to justify its rates. In NTN's view, a customer-specific offering can never fail a net revenue test as long as AT&T charges a price greater than its access charges. *Id.* at 10-11.

C. US Sprint Petition to Reject

12. US Sprint asserts that AT&T's transmittal contains three critical deficiencies, each of which is sufficient grounds for rejection. It claims that CPP2: (1) is unreasonably discriminatory and violates the Commission's *Volume Discount Order;* (2) is a blatant attempt by AT&T to circumvent price cap regulation; and (3) is based on a faulty financial analysis which calls into question the alleged profitability of the RCI offering. US Sprint Petition to Reject at 2.

13. According to US Sprint, customer-specific offers are unreasonably discriminatory because such offers allow AT&T to exercise its substantial market power in the 800 Services market in an anticompetitive manner. US Sprint explains that customers with heavy 800 traffic volumes, such as RCI, are reluctant to choose an interexchange carrier (IC) other than AT&T since such a choice would necessitate changes to the customer's existing 800 numbers. US Sprint argues that AT&T will use customer-

specific offerings to target that portion of the market for which there is a possibility of competition - - those customers who indicate a willingness to switch to another IC and change their 800 numbers. It claims that because AT&T retains market power in a substantial segment of the 800 Services market, AT&T will reduce rates to individual customers in order to defeat any competitor's threat while continuing to enjoy monopoly profits for those customers who would not be able to take competing service. *Id.* at 5. In addition, US Sprint contends that AT&T's offer to extend CPP2 to other customers who can demonstrate that they have received a substantially similar offer from one of AT&T's competitors does not make CPP2 any less discriminatory. It believes AT&T's tariff remains unreasonably discriminatory because that tariff restricts the number of potential customers with substantially similar usage characteristics. US Sprint claims that resellers will be prevented from taking advantage of AT&T's discounted services. US Sprint maintains that this discrimination against resellers cannot be justified under competitive necessity. *Id.* at 5-7.

14. US Sprint argues that by placing RCI's service offering in Tariff 15, AT&T is able not only to limit its availability to specific customers, it is also able to circumvent all price cap regulations for these services. US Sprint predicts that if AT&T is allowed to pull certain service offerings to favored customers outside the sphere of price cap regulation, AT&T will attempt to recover all of that service's joint and fixed costs from those customers subscribing to services at the capped rates, while selected large business customers will take the identical services at discounted rates under Tariff 15. *Id.* at 9-10.

15. Finally, US Sprint claims that AT&T should not have used a net revenue showing to justify its rates. According to US Sprint, the Commission has never stated that the net revenue test is the appropriate cost standard to apply to competitive services. Even if this showing were applicable, US Sprint maintains that some of the key assumptions underlying AT&T's analysis are incorrect and that AT&T substantially overstates the profitability of its offering. *Id.* at 11-14.

D. MLD/CSI Petition to Reject or Suspend and Investigate

16. MLD/CSI argue that since the instant AT&T transmittal raises virtually the same issues that were examined in the HRP investigation, the Commission must, at minimum, suspend and set CPP2 for investigation. They urge the Commission to evaluate CPP2 under existing standards and to avoid repealing earlier determinations in a narrow tariff proceeding. MLD/CSI maintain that CPP2 is not generally available, despite the revisions to AT&T's Tariff 15 regulations. They believe that the Tariff 15 revisions will have the effect of transforming competitive pricing plans from limited competitive responses to a broad vehicle for offers and counter-offers, with all other customers who take service under AT&T's general offering ultimately bearing the costs of these large discounts. *Id.* at 5.

E. CompTel Petition to Reject or Suspend and Investigate

17. CompTel agrees with MLD/CSI that because of the similarities between CPP2 and HRP, the Commission must, at the very least, suspend and investigate the instant AT&T transmittal. CompTel Petition to Reject or Suspend and Investigate at 3. In its view, the only substantively new feature of the instant CPP2 plan is AT&T's revision of Tariff 15 to provide that competitive pricing plans will be made available to customers with a substantially similar offer from a competing IC. CompTel believes this provision will pervert the concept of competitive necessity by encouraging individual discounts on a wide scale. According to CompTel, every large business telecommunications user would know that it could simply shop for the best discount proposal from MCI or another competitive carrier, and then present that proposal to AT&T to receive its "competitive response" under a competitive pricing plan. CompTel predicts this will result in unreasonable discrimination against all other AT&T customers, who would ultimately bear the cost of these large-customer discounts. *Id.* at 4-6. Finally, CompTel attacks the veracity of AT&T's claim that competitive pricing plans will recover all costs. According to CompTel, the net revenue test employed both in HRP and CPP2 is an incremental costing approach that loads common costs on ratepayers other than the beneficiary of the single-customer discount. Since these ratepayers bear a larger percentage of the common costs than they would bear absent discriminatory prices, CompTel concludes that these customers will subsidize AT&T's services to the favored few. *Id.* at 6.

F. AT&T Reply

18. AT&T argues that under the well-recognized doctrine of competitive necessity, CPP2 is lawful in all respects, and is entirely consistent with the Commission's policies. It believes MCI is incorrect in asserting that competitive necessity is not available to interexchange telecommunications under the Communications Act. AT&T says that the Commission embraced the Supreme Court's construction of the meeting competition defense under the Robinson-Patman Act when formulating the competitive necessity test. AT&T Reply at 5-6. Furthermore, AT&T maintains that, contrary to the claims of petitioners, the competitive necessity test applies to all ICs regardless of their market power. AT&T asserts that it wields no unique market power and enjoys no special advantages with respect to RCI's business, which is why it had to respond to MCI's offer with CPP2. *Id.* at 6-8.

19. AT&T argues that CPP2 complies with each element of the competitive necessity test. AT&T claims MCI admits that the total price for the services it offered RCI is less than the total price for comparable services offered under CPP2. It believes MCI's failure to deny this point proves that CPP2 meets the critical inquiry under competitive necessity. *Id.* at 9-10. Although MCI and other petitioners continue to claim that CPP2 is limited to a single customer, AT&T contends that the Commission eliminated this assertion as grounds for suspension in the HRP *Investigation Order*. Moreover, AT&T argues that the Commission has never held that discounted offerings cannot be justified unless the offerings are part of an integrated rate structure without customer or use restrictions. With regard to the third element of competitive necessity, AT&T reiterates its contention that CPP2 revenues will exceed costs, on a discounted basis, by $366,709 through 1992, and will, therefore, contribute to overall costs. Because its revenues will exceed costs, AT&T dismisses petitioners' claims that CPP2 is predatory and that other services will need to subsidize CPP2. *Id.* at 11-13.

20. Lastly, AT&T disputes contentions that CPP2 does not comply with all applicable tariff support requirements. It claims NTN and US Sprint have misread the Commission's statement in the *Price Cap Order* regarding the net revenue test[9] According to AT&T, the plain intent of the Commission's statement is that the net revenue standard cannot be used as the sole justification for offerings in Tariffs 12, 15, and 16. *Id.* at 14. AT&T states that such services, because they are outside of price caps, are still subject to the Commission's conventional tariff support requirements contained in Section 61.38 of the Commission's Rules. AT&T maintains it is no longer possible to meet Section 61.38 cost support requirements using a fully distributed cost analysis because the Commission discontinued the Interim Cost Allocation Manual in the *Price Cap Order*. *Id.* at 15-16.

IV. DISCUSSION

21. We have concluded, based on our review of the instant transmittal and the pleadings, that AT&T's offering raises significant issues that warrant investigation. Single-customer offerings raise serious questions of compliance with the Communications Act's prohibition against unreasonable discrimination. Yet, as the Commission observed when it initated its investigation of the Holiday Rate Plan, "[l]egal precedent supports the view that otherwise discriminatory rates can be reasonable where justified by competitive necessity."[10] Determining whether AT&T may properly rely upon competitive necessity in this instance, however, requires further analysis and additional information from interested parties.

22. We have also concluded that the issues raised by this transmittal warrant exercise of our discretion to suspend pending investigation. We recognize that suspension is a severe regulatory action because it delays the implementation of new offerings. In deciding whether to suspend, we have balanced the interests of ratepayers, the filing carrier, and the competitive process. We have determined that the potential for a violation of Section 202(a) of the Communications Act by the instant transmittal outweighs the negative impact upon AT&T and its customer of delay in the availability of the proposed rate.

23. We recognize that in the HRP proceeding, the Commission chose not to suspend. However, in that case, the record then before the Commission indicated that AT&T's tariff responded to an outstanding MCI offer. The Commission concluded that "suspension would appear to have the effect, in this case, of favoring one side in a competitive rivalry for customers."[11] The pleadings now before the Bureau do not compel the same conclusion. Indeed, MCI maintains that the MCI offer upon which AT&T relies to justify the instant transmittal was unauthorized, has been withdrawn, and was in any case inconsistent with its pricing rules.[12] Although the withdrawal of MCI's offer would not necessarily undercut AT&T's theory of competitive response, that withdrawal is a factor in our balancing of interests in deciding whether to suspend. Under the specific circumstances of MCI's offer in this instance, we conclude that the Commission's preference for avoiding unnecessary disruption of the competitive balance in the marketplace does not require that we refrain from suspending this transmittal.

24. The primary issues for investigation are:

A. Does this AT&T offering create unreasonable discrimination in rates charged to AT&T customers for like communications services in violation of Section 202(a) of the Communications Act?

B. Does this AT&T offering create unreasonably low rates in violation of Section 201(b) of the Communications Act?

25. AT&T effectively concedes that this offering discriminates against customers of like services and relies on the affirmative defense of competitive necessity to justify the discrimination. Therefore, we require AT&T and MCI to respond to each of the following subsidiary questions:

A. Can the competitive necessity defense justify single customer offerings? If so, under what circumstances?

B. Can the competitive necessity defense justify a response to an unlawful competing offer? If so, under what circumstances?

C. Was the MCI offer to RCI lawful under Section 202(a) of the Communications Act?

26. AT&T contends that because of its reliance on the competitive necessity defense, a net revenue test should be used to determine whether these rates are unreasonably low. In order to aid the Commission in evaluating that contention, all parties are encouraged to discuss court or Commission precedents that may be relevant, the nature and significance of market conditions in the relevant market or submarket, and the effect, if any, of the adoption of price cap regulation upon the evaluation of rates for services that have been excluded from price caps.

27. Any participant who believes that a net revenue test should not be used for this purpose should describe the test that the participant advocates and explain why the latter test should be used.

28. AT&T may supplement its net revenue showing in the direct case and/or present alternative showings under other tests if it chooses to do so. Other participants may, of course, present information or arguments to contest the sufficiency of any showing AT&T has made or may make.

29. In order to make any determination of the lawfulness of Tariff 15, however, we must also consider the lawfulness of MCI's equivalent offer. Therefore, in conjunction with our investigation of AT&T's tariff pursuant to Section 204(a), we will investigate MCI's offer pursuant to the authority granted the Commission in Section 403 of the Communications Act, 47 U.S.C. § 403. In addressing the lawfulness of MCI's offer to RCI, parties should describe the particular facts used to support their positions.

V. PROCEDURAL MATTERS

30. This investigation will be conducted as a notice and comment proceeding. AT&T and MCI are designated as parties. AT&T and MCI shall file their direct cases no later than *February 20, 1990*. The direct cases shall present AT&T and MCI's positions with respect to the issues described in this Order. Pleadings responding to direct cases may be filed no later than *March 22, 1990*, and must be captioned "Opposition to Direct Case" or "Comments on Direct Case." The direct cases should be addressed in a

single pleading. AT&T and MCI may each file a "Rebuttal" to oppositions or comments no later than *April 6, 1990*. Pleadings responding to rebuttals may be filed no later than *April 21, 1990*.

31. An original and seven copies of all pleadings shall be filed with the Secretary of the Commission. In addition, one copy shall be delivered to the Commission's commercial firm for copying, International Transcription Service, Inc. (ITS), Room 246, 1919 M Street, N.W., Washington, D.C. 20554. Members of the general public who wish to express their views in an informal manner may do so by submitting one copy of their comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554.

32. *Ex parte* contacts (*i.e.*, written or oral communications which address either the procedural or substantive merits of the proceeding which are directed to any member, officer, or employee of the Commission who may reasonably be expected to be involved in the decisional process in this proceeding) are permitted in this proceeding until a public notice of scheduled Commission consideration of a final Order is released and after the final Order itself is issued. Written *ex parte* contacts must be filed on the day submitted with the Secretary and Commission employees receiving each presentation. For other requirements, *see generally* Section 1.1200 *et seq.* of the Commission's Rules, 47 C.F.R. § 1.1200 *et seq.*

33. All relevant and timely comments and reply comments will be considered by this Commission. In reaching a decision, the Commission may take into account information and ideas not contained in comments, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of reliance on such information is noted in the Order.

34. The investigation established in this Order has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection, or recordkeeping, labeling, disclosure, or other record retention requirements as contemplated under the statute. *See* 44 U.S.C. § 3502(4)(A).

VI. ORDERING CLAUSES

35. Accordingly, IT IS ORDERED that, pursuant to Sections 204(a) and 403 of the Communications Act of 1934, 47 U.S.C. §§ 204(a), 403, an investigation IS INSTITUTED into the lawfulness of the tariff revisions filed by AT&T Communications, Inc., in Tariff F.C.C. No. 15, Transmittal Nos. 1854 and 1883, and into the lawfulness of the offer made by MCI Telecommunications Corporation to Resort Condominiums International.

36. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the instant tariff revisions filed by AT&T Communications, Inc. ARE SUSPENDED until June 21, 1990.

37. IT IS FURTHER ORDERED that AT&T Communications, Inc. SHALL FILE a supplement reflecting this suspension no later than January 26, 1990. Special Permission No. 90-41 is assigned for this purpose.

38. IT IS FURTHER ORDERED that the petitions to reject AT&T Communications Transmittal No. 1854 filed by MCI Telecommunications Corporation, National Telecommunications Network, and US Sprint Communications Company Limited Partnership ARE DENIED.

39. IT IS FURTHER ORDERED that the petitions to reject or suspend and investigate AT&T Communications Transmittal No. 1854 filed by Competitive Telecommunications Association and Metromedia Long Distance, Inc. and Communications Services, Inc. are GRANTED to the extent indicated herein and are otherwise DENIED.

40. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] AT&T's Competitive Pricing Plans offer telecommunications service to a specific customer at rates established to respond to a competitor's offer. AT&T's first Competitive Pricing Plan, the Holiday Rate Plan (HRP), was introduced in tariff revisions filed May 9, 1988, under Transmittal No. 1215. On November 6, 1989, AT&T filed amendments to CPP2 under Transmittal No. 1883.

[2] *See* note 1, *supra*.

[3] *See* AT&T Communications, CC Docket No. 88-471, FCC 88-299, 4 FCC Rcd 7712 (1988).

[4] *Id.* at 7712-13.

[5] AT&T Communications, CC Docket No. 88-871, FCC 89-303, 4 FCC Rcd 7933, 7934 (1989) (*HRP Final Order*).

[6] By letter dated October 16, 1989, RCI informed MCI that it had rejected its offer. *See* Letter to Chief, Common Carrier Bureau from MCI, Re AT&T Transmittal Nos. 1854 and 1883, dated January 11, 1990.

[7] *See also* Private Line Rate Structure and Volume Discount Practices, CC Docket No. 79-246, 97 FCC 2d 923, 948 (1984) (*Volume Discount Order*).

[8] MCI also argues that the competitive necessity defense, as developed under the Robinson-Patman Act, should not apply to interexchange telecommunications under the Communications Act. MCI Petition to Reject at 8.

[9] *See* Policy and Rules Concerning Rates for Dominant Carriers, 4 FCC Rcd 2873, 3034 n. 671 (1989) (*Price Cap Order*).

[10] *HRP Investigation Order*, 4 FCC Rcd at 7713.

[11] *Id.* at 7724.

[12] *See* MCI Petition to Reject at 9. *See* also Letter to Chief, Common Carrier Bureau from MCI, Re AT&T Transmittal Nos. 1854 and 1883, dated Jan. 11, 1990.

Before the FCC 90-89
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Policy and Rules Concerning Rates for Dominant Carriers	)	CC Docket No. 87-313

SUPPLEMENTAL NOTICE OF PROPOSED RULEMAKING

Adopted: March 8, 1990 ; Released: March 12, 1990

By the Commission: Commissioners Sikes, Chairman; Quello, Marshall, and Barrett voting in favor of adoption; Commissioner Duggan not participating.

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I. INTRODUCTION

1. On April 17, 1989, the Commission released a Report and Order and Second Further Notice of Proposed Rulemaking in the above proceeding.[1] In adopting the Report and Order and Second Further Notice, the Commission found as a matter of policy that incentive regulation is a superior method of regulating the American Telephone and Telegraph Company (AT&T) and the local exchange carriers (LECs).[2] In the portion of the document constituting the Report and Order, the Commission adopted a set of final rules to implement incentive regulation of AT&T as of July 1, 1989.[3] In the portion of the document constituting the Second Further Notice, the Commission made a series of tentative findings and issued proposed rules to implement incentive regulation for LECs on July 1, 1990.[4] In this Supplemental Notice, we seek additional comment on some of those proposed rules and on certain limited modifications to the prior proposals.

2. In the Second Further Notice, the Commission articulated a policy judgment that incentive-based regulation is superior to rate of return for the regulation of certain dominant carriers.[5] The policy statement was based on a comparison of the existing rate of return system with an incentive-based system. In this Supplemental Notice, we reaffirm the basic policy judgment that a properly designed system of incentive regulation will be an improved form of regulation, generating greater consumer benefits.

3. By establishing limits on prices carriers can charge for their services, and placing downward pressure on those limits or "caps," we can ensure that prices decline in real terms and create a regulatory environment

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1 Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873 (1989) and Erratum, 4 FCC Rcd 3379 (1989) (together Second Further Notice). See also Clarification of Cap on Common Line Rates Proposed Price Cap Rules for Local Exchange Carriers, CC Docket No. 87-313, Public Notice, 4 FCC Rcd 4775 (1989). For a detailed account of the procedural history of this rulemaking, see Second Further Notice, 4 FCC Rcd at 2878-81 (paras. 7-14).

2 Second Further Notice, 4 FCC Rcd at 2931-33 (paras. 113-114).

3 Id. at 3318 (Appendix B). Petitions for reconsideration of those rules are now pending before this Commission.

4 Id. at 3342 (Appendix D).

5 Second Further Notice, 4 FCC Rcd at 2931 (para. 113).

that requires carriers to become more productive. Carriers that can substantially increase their productivity can earn and retain profits at levels above those we apply to rate of return carriers. If carriers fail to become more productive, they risk seeing their earnings erode. As a result of the incentives created by this form of regulation, carriers have strong incentives to innovate. Incentive regulation also provides an opportunity to de-emphasize cost allocation systems that depend on fully distributed costing methods to derive LEC rates, a pricing methodology that we believe may generate consumer welfare losses. Finally, incentive regulation also provides an opportunity to streamline the tariff filing process, substantially mitigating the administrative burdens carriers face.

4. We are not alone in our efforts to find a workable alternative to traditional rate of return regulation of dominant carriers in the telecommunications industry. State legislatures and utility commissions in a number of states have adopted or otherwise authorized some form of alternative regulation of the telecommunications carriers subject to their jurisdiction.[6] In many jurisdictions, utility commissions are now or will soon be investigating such alternatives. We hope our proposal contributes toward the emerging consensus that incentive regulation serves both the industry and its customers far better than rate of return.

5. We are in this Supplemental Notice exploring further the details of implementing a sound incentive-based system for LECs. Many of the concerns raised by commenters concerning the problems of applying incentive regulation to LECs are discussed in later sections of this notice. As the Second Further Notice stated, a policy judgment that incentive regulation is a better regulatory system than the current system only begins the process of regulatory reform. Before we can be in a position to implement such a system, we must explore a number of issues to ensure that the new regulatory mechanism will work properly. In this Supplemental Notice, we turn our attention to that task.

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6 See S.M. Schmitz and M.D. Drainer, Report on Telecommunications Alternative Regulation Plans by State, Vol. 2, Missouri Office of the Public Counsel, January 1990. For example, in October 1989, the California Public Utility Commission adopted an incentive regulatory framework to replace its traditional rate of return regulation of Pacific Bell and GTE California. Recently, Rochester Telephone and the staff of the New York Public Service Commission reached an agreement on a plan that provides Rochester with increased pricing flexibility for some of its services in return for sharing earnings with ratepayers above a certain level.

A. Background

6. The proposal for incentive regulation of the LECs described in the Second Further Notice depends primarily upon a cap, or ceiling, on LEC prices. The cap would be established by reference to a formula that reflects (a) changes in the cost of factors of production through use of the Gross National Product Price Index (GNP-PI), (b) a productivity offset representing the historical difference between LEC industry productivity improvements and productivity gains in the economy as a whole, (c) certain specific cost changes beyond the carrier's control (known as exogenous costs), and (d) a consumer productivity dividend (that results in overall rate reductions in excess of historical performance).[7]

7. The Commission's investigation of productivity, an essential factor in the price cap formula, has thus far revealed that there is less reliable, hard data concerning post-divestiture LEC productivity performance than exists for AT&T in the post-divestiture era. Second, the record raised questions whether there exists sustained, company-by-company variation in productivity growth. As a result of these twin concerns, the Commission recognized that there was less assurance than in the case of AT&T that the price cap formula for LECs would produce results beneficial to consumers in every case. The Commission therefore proposed a rule that would move price cap ceilings down if a carrier earned more than 2 percent above the authorized rate of return for rate of return carriers and would, at the other extreme, move the price cap ceiling up if a carrier earned an amount 2 percent or more below the authorized rate of return. This proposal is termed the "automatic stabilizer".

8. The proposal for the LECs would require a division of services into three baskets with each basket subject to a separate price cap index: a common line basket; a traffic sensitive basket; and a basket for all other access services. The "all other" basket includes special access services and interexchange services.[8] In the Second Further Notice, the Commission proposed a formula for setting a cap on the carrier common line rate that was different from the basic price cap formula. The formula proposed is a simple average of the "per minute" and "per line" approaches to setting a cap for common line.[9]

9. The use of a separate common line basket serves to facilitate the continuation of a number of programs that promote universal telephone

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7 Second Further Notice, 4 FCC Rcd at 3186 (paras. 642-644).

8 Id. at 3235-40 (paras. 751-759).

9 Id. at 3222-23 (paras. 722-726).

service. These programs employ common line cost recovery mechanisms to ensure that high cost, rural, and smaller carriers can continue to provide affordable telephone service to all Americans. By proposing to isolate common line in its own basket, the Commission tentatively found it could better ensure that these programs would continue unimpeded once the surrounding regulatory structure changed.[10]

10. In addition, the LEC proposal includes actual price indexes to enable us to determine whether a particular LEC's aggregate rates for services in each basket have exceeded the limits defined by the price cap index for that basket. In particular, the LEC proposal would limit annual price movement for certain rates or services to no more than 5 percent up or 5 percent down per year. These limits, known as "bands," would apply to rates for the three Part 69 rate elements in the traffic sensitive switched basket and to the ten categories of service in the "all other" basket.[11] Compliance with the plus or minus 5 percent pricing bands would be measured by using service band indexes. Rates in the common line basket would not be banded, since rates for all but one common line element (the carrier common line charge) would be fixed by our rules.[12]

11. Furthermore, LEC tariff filings for services in a particular basket that result in an actual price index for that basket that is no greater than the applicable price cap index, and that do not cause the applicable service band index to exceed the specified limits, would be eligible for streamlined review. Tariff revisions eligible for streamlining would be filed on 14 days' notice, would be presumed lawful, and would therefore not normally be subject to suspension. Tariff filings in a particular basket that cause the actual price index for that basket to exceed the applicable price cap index or that cause the applicable service band index to exceed the specified limits would not only face lengthier tariff review, but would also have to be supported by special showings depending on the circumstances. Specifically, above-cap filings would have to demonstrate, down to the lowest

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10 Id. at 3273-77 (paras. 834-842).

11 Specifically, the three bands in the traffic sensitive switched basket would apply to "local switching," "transport," and "information." The Second Further Notice sought comment on whether the optional equal access element or Basic Service Elements defined under our Open Network Architecture policies should be treated as separate service categories. 4 FCC Rcd at 3236 n.1579. The ten bands in the "all other" basket apply to the following service categories: metallic; telegraph; program audio; voice grade; video; wideband audio; wideband data; digital data; high capacity; and interexchange or corridor service.

12 Id. at 3235 n.1577.

possible level of disaggregation, that costs had been properly allocated in the relevant basket, including a detailed explanation of the prices of any rate elements to which costs are not assigned, and how costs have been allocated among the three baskets. Such above-cap filings would face a high probability of suspension pending a determination of the appropriateness of such allocations.[13] Within-cap but above-band filings, while not as likely to be suspended, would nevertheless have to be supported by a showing of substantial cause.[14] Similarly, within-cap, below-band filings, would be required to include supporting materials establishing that the rates cover the relevant service category's average variable cost.[15]

12. We also note that special rules would apply to the establishment of rates for new LEC services and to the modification of rates when existing services are restructured. When new services are to be offered, these rules would require that the relevant filings include cost data sufficient to establish that the new service (and each unbundled element thereof) will generate a net revenue increase within the lesser of two specified time periods.[16] Similarly, when LEC services are to be restructured, the rules would specify that the proposed tariff revisions include supporting materials sufficient to make the necessary adjustments to the affected indexes.[17] Also, the incentive regulation proposal for the LECs includes provisions for monitoring service quality, for assessing the impact of such regulation on the states, and for an overall performance review after two or three years.[18]

13. To allay concerns about LEC service quality under incentive regulation and to facilitate the later evaluation of the program, the Commission proposed in the Second Further Notice that LECs subject to

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13 Id. at 3258 (paras. 800-802).

14 Id. at 3255-56 (paras. 795-96). See also Section 61.49(e) of the Commission's Rules.

15 Id. at 3259 (para. 805). See also Section 61.49(d) of the Commission's Rules.

16 Id. at 3265-66 (paras. 821-22) (proposing that the new service would have to generate net revenue within the lesser of 24 months from the incorporation of the service into price caps or 36 months from the effective date of the service). See also Section 61.49(g) of the Commission's Rules.

17 Id. at 3267 (para. 825). See also §61.49(f) of the Commission's Rules.

18 Id. at 3284-85 (paras. 860-861).

incentive regulation file quarterly reports on the quality of their service in seven categories: installation interval, repair interval, network blocking percentage, formal Commission complaints, post-dial delay, transmission quality, and switch downtime.[19]

14. Finally, while LECs subject to incentive regulation would no longer be subject to a single target rate of return, the Bell Operating Companies (BOCs) would be required under our LEC proposal to continue to submit data that will enable the Commission to prescribe a target rate of return for those LECs that are not subject to price caps. In this regard, it is important to note that not all LECs would be required to participate in incentive regulation and that not all LECs will be eligible to participate. Only Tier 1 LECs that have withdrawn from the National Exchange Carrier Association (NECA) pools and their cost-based affiliates would be required to participate. Non-pooling LECs other than average schedule companies would be eligible to voluntarily participate in such regulation.[20]

B. Summary of Supplemental Notice

15. In this Supplemental Notice, we seek additional comments on certain specific aspects of the LEC price cap proposal.

1. Productivity

16. This Supplemental Notice includes our critique of the various studies of LEC productivity submitted in the most recent round of pleadings, focusing on the study submitted by AT&T and the responses to it. We also present two new staff studies that provide additional evidence of measures of LEC productivity in the post-divestiture era. We seek comment on these studies, as well as on how to harmonize their results with each other, and with the productivity record as a whole.

2. Automatic Stabilizer

17. We also propose to modify the existing automatic stabilizer proposal in two significant respects. First, we propose to employ our Section 205 authority to prescribe the stabilizer zone in addition to relying upon that stabilizer for the more limited purpose of adjusting the price cap index and related no-suspension zone. The zone of reasonableness we propose would be bounded at the low end by an earnings level we will call the lower "formula adjustment" mark for price cap carriers. If a carrier's earnings for a historical base year fail to achieve the lower "formula adjustment" mark,

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19 Id. at 3161-63 (paras. 599-604).

20 Id. at 3176-80 (paras. 623-632).

a carrier may increase its Price Cap Index, so that, based on historical base year data, the carrier would have an opportunity to earn a return at least equivalent to the lower limit. At the top end of the zone, we propose a tapered sharing device, so that as the level of historical earnings rise, carriers would be required to share a larger portion of their earnings with customers. Earnings above a return level we will call the upper "formula adjustment" mark would also trigger a downward adjustment in a carrier's Price Cap Indexes, so that, based on historical base year data, the carrier would not have the opportunity to compound high earnings. We tentatively find that such prescription of the zone strengthens the price cap proposal both from the ratepayers' and the LECs' point of view. This represents an important change in the legal theory upon which our price cap proposal is based.[21] In addition to the proposed adoption of new rules to set a stabilizer that would trigger prospective changes in a carrier's PCI and related "no-suspension" zone, we now propose to prescribe the stabilizer under Section 205.[22] Accordingly, unlike the plan set forth in the Second Further Notice, the price cap system we are proposing today depends upon a prescription of an earnings zone for these LECs as well as modifications in the procedures used to review their tariffs.

18. Second, we propose to expand our ongoing Part 65 prescription process, which is presently engaged in represcribing a target rate of return under the existing system, to include prescription of a stabilizer zone and the sharing device under the proposed price cap system. We tentatively find that the Part 65 "paper hearing" process is best suited, procedurally and substantively, to defining an earnings zone that will reflect the risks faced by price cap carriers. We direct the Common Carrier Bureau to issue an order expanding the issues in the Part 65 proceeding to include prescription of a price cap stabilizer.

3. Existing Rates and Procedural Issues

19. In addition to these concerns, this Supplemental Notice also seeks comment on several issues related to the new proposed LEC implementation date of January 1, 1991, and the new proposed initiation of LEC price cap indexes as of July 1, 1990. Deferral of the proposed implementation date by six months and the comparable delay in the initiation of price cap indexes require us to consider the effect of such delays on the reasonableness of relying on existing rates, the relationship of those existing rates to the ongoing represcription proceeding, and the future scheduling of price cap filings. We tentatively conclude that the rates in effect on July 1, 1990, would be, in general, a reasonable starting point,

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21 Id. at 3295-3307 (paras. 880-896).

22 47 U.S.C. §§ 204, 205.

but we propose to adjust price caps on the day they are implemented in the event the represcription process yields a target rate of return different from the currently authorized 12 percent or in the event rates are adjusted during 1990 to correct an under-or over-earnings problem. We also tentatively conclude that the first price cap filing should be for an initial six-month period, so that price cap carriers will revert to an annual filing each April with price cap tariffs effective July 1.

4. Pricing Flexibility

20. Finally, we seek additional comment on rate flexibility issues. While many have criticized the extent of pricing flexibility for LECs in our proposal, few have presented specific alternatives to address what they perceive to be a major flaw in the price cap system. This Supplemental Notice presents an opportunity for all parties to focus on this issue to see if a more optimum solution exists.

21. We are not in this Supplemental Notice seeking comment on the many other issues that have been raised to date with regard to incentive regulation of the LECs. Our decision not to seek additional comments on such issues should not be viewed as an indication that they lack importance or that this Commission has already decided them. On the contrary, many issues not addressed in this Supplemental Notice are crucial to the design of a workable plan for incentive regulation of the LECs. However, in reviewing the many comments submitted in response to the Second Further Notice, we believe that the current record will be more than adequate for us to decide most of the issues presented. We have, accordingly, limited this Supplemental Notice to those areas in which we propose significant modifications to the earlier plan or for which we believe additional comment is needed to develop the record more fully. We are therefore most interested in receiving additional information and supporting data on the items set forth in this Supplemental Notice.

22. The text of this Supplemental Notice is divided into nine sections. Section II contains a discussion of LEC productivity. Section III includes our revised proposals for the automatic stabilizer. Section IV addresses a number of implementation issues relating to timing and the use of existing rates. Section V discusses the pricing flexibility issue. The final four sections of this notice contain our Paperwork Reduction Act analysis, Regulatory Flexibility Act analysis, ex parte requirements, and ordering clauses.

II. LEC PRODUCTIVITY

A. Summary of Tentative Findings

23. The Commission has reviewed evidence on LEC productivity on two occasions. In the Further Notice, the analysis of productivity data led the Commission to conclude that the best estimate of potential annual productivity gain in the telecommunications industry as a whole is 2.5 percent over and above the level achieved by the economy.[23] In reaching this result, the Commission relied principally upon long term historical Bell System productivity. The Commission explained that the use of a number that is grounded in long term historical experience reflects the fact that, while productivity may change from year to year in response to a number of factors, a long term average is more likely to bear a closer relationship to the level of productivity in the future than would predictions based on short term experiences, even recent experience. The Commission further concluded that productivity for the LECs and AT&T was fundamentally the same.[24] However, the Commission recognized that the long term historical Bell System data upon which it relied to set the LEC productivity factor reflected a unified Bell System. The Commission therefore examined other measures and indexes of productivity to corroborate historical productivity estimates.[25]

24. In the Second Further Notice, the Commission reaffirmed its tentative view that 2.5 percent is the best estimate of the differential between LEC productivity and the productivity of the economy as a whole. The Second Further Notice also restated the Commission's tentative view that LEC productivity is not likely to vary from the long term trend on a sustained basis due to technology now in use, the installation of new technology, investment patterns, or other characteristics. The Commission noted that attempts to corroborate the long term productivity factor for LECs with post-divestiture data had thus far proved to be unsuccessful. In particular, a post-divestiture study of LEC productivity submitted by Bellcore, and revised by AT&T, contained numerous flaws that cast substantial doubt on the results of these studies.[26]

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23 Further Notice, 3 FCC Rcd at 3407 (para. 385).

24 Id. at 3399-3404 (paras. 363-374).

25 Id. at 3403-07 (paras. 375-385).

26 Second Further Notice, 4 FCC Rcd at 3208-12 (paras. 693-700). The flaws in the Bellcore Study were discussed at length in Appendix E to the Second Further Notice.

25. The Second Further Notice, like the Further Notice, noted unique problems associated with applying a productivity offset to common line rates. The Commission explained that while most common line rates are flat per line charges that mirror the nontraffic sensitive nature of common line plant, the carrier common line charge is a per minute rate that essentially recovers the residual common line costs not recovered by the flat charges. The problems of setting a price cap for the carrier common line rate stem from attempting to use a per minute charge to recover a fixed cost. The Commission tentatively found that some growth in minutes per line should be considered exogenous, as opposed to an increase in productivity. However, the Commission also found that some growth in minutes should be credited toward productivity, since growth in minutes is embedded in historical productivity measures. In the Second Further Notice, to accommodate the unique nature of common line rates, the Commission proposed a formula for setting a cap on the carrier common line rate that was different from the basic price cap formula. It proposed a formula that was a simple average of the "per minute" and "per line" approaches to setting a cap for common line.[27] The Commission tentatively concluded that averaging the per minute and per line approaches in this way was an appropriate means of accounting for LEC common line productivity.

B. Pleadings

26. The larger LECs generally endorse the proposed 2.5 productivity factor as reasonably based on the Commission's finding that telecommunications productivity has exceeded the general economy productivity by about 2 to 3 percent over the past forty years.[28] In their view, although the record shows that they have experienced advances in telecommunications technology, it contains no empirical evidence that these technological advances will have a significant or revolutionary impact on the total factor productivity of the telephone industry as a whole or the LECs in particular.[29] Historical experience, they say, is a relevant predictor of their potential future productivity gains.

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27 4 FCC Rcd at 3221-22 (paras. 721-24). On May 30, 1989, the Commission issued a Public Notice entitled "Clarification of Cap on Common Line Rates Proposed Price Cap Rules for Local Exchange Carriers" (DA 89-593, CC Docket No. 87-313) to clarify its proposed cap on common line rates for LECs. In that Notice, the Commission noted that the formula it selected should be calculated on a total common line basis, and provided examples of how the common line cap would operate under various assumed conditions.

28 NYNEX Reply 28; SWB Reply at 40; Pactel Reply at 19-20; Bell Atlantic Comments at 1-3.

29 NYNEX Reply at 28.

27. Still other commenters argue that the productivity offset is too high or too low. For example, a number of independent LECs dispute our 2.5 percent productivity factor as too high for independent telephone companies to achieve. They argue that independent companies have less productivity than the BOCs and that this fact should be reflected in the selection of a productivity number. Accordingly, they advance LEC productivity factors of between 1.5 and 1.9 percent. On the other hand, interexchange carriers, users, and others argue that the proposed LEC productivity factor is far too low. AT&T argues that the productivity factor should be 3.3 percent (if the common line basket is capped on a per line basis) or 7 percent (if the common line basket is capped as proposed).[30] ETI, on behalf of Ad Hoc and ICA, "corrects" certain productivity studies to a 4-9 percent range.

1. The AT&T Study

28. Several parties submitted new data and analysis in this round of comments probative of the size of the productivity offset.[31] Of all the data and analysis received, the one provided by AT&T generated the most comment. AT&T vigorously challenges the 2.5 percent proposed productivity factor with detailed studies to demonstrate that the proposed offset is much too low.[32] To demonstrate the alleged deficiency in the proposed offset, AT&T presents both an historical and a prospective comparison of interstate access charges under the LEC price cap plan and under rate of return regulation. In its analysis, AT&T updates its historical review of switched access rates that it first submitted as comments on the Further Notice.[33] It then presents a prospective analysis of switched access rates under the price cap

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30 AT&T's proposed offsets do not include the Consumer Productivity Dividend. AT&T would add 0.5 percent to its proposed factors for totals of 3.8 percent and 7.5 percent, respectively. AT&T Comments at 17.

31 See, e.g., id. at Appendix A (reviewing what the productivity offset would have been during 1986-1989, and what it would have to be during 1990 to 1993, for price cap regulation to produce rates equivalent to rate of return); CBT Comments at Attachment 1 "Incentive Regulation and Estimates of Productivity", prepared for CBT by NERA, June 9, 1989 (concluding that the productivity of CBT from 1984-1988 was approximately three full percentage points per year less than that of the BOCs according to an analysis similar to the "value-added" method used by AT&T for studying the productivity of the Bell System from 1947-1979).

32 See AT&T Comments at Appendix A.

33 Id. at Appendix A, Part I. See also AT&T's Comments on the Further Notice at Appendix E.

proposal of the Second Further Notice and under continued rate of return, using alternative projections concerning future demand growth, changes in nontraffic sensitive costs, and changes in unit traffic sensitive costs.[34] AT&T also recomputes these results to show the effect on the productivity offset of a per line price cap. Finally, AT&T computes the differences in special access rates if the current LEC price cap plan had been in effect over an historical period.[35]

29. The historical portion of AT&T's analysis computes the switched access revenues that would have been produced during 1986-1989 had any one of three LEC price cap plans been in place: (1) a per minute cap on common line rates with no adjustment for demand stimulation that has accompanied rate decreases;[36] (2) the common line price cap proposed in the Second Further Notice that averages a per minute and per line approach to the common line cap; and (3) a per line cap on common line that AT&T has consistently advocated throughout this proceeding. AT&T then compared the switched access revenues LECs would have obtained under any one of these price cap approaches to actual revenues experienced under rate of return regulation, thereby determining cumulative revenue differences that would have occurred from 1986-1989. Using these revenue differences, AT&T presented values of the productivity factor that would have been necessary to yield the same results as under rate of return regulation. The productivity factors AT&T calculates are as follows: (i) a per minute cap, with no exogenous demand stimulation: 10.2 percent, (ii) a common line capped as proposed in the Second Further Notice: 7 percent, (iii) a per line cap: 3.7 percent.[37] AT&T states that these productivity offsets are exclusive of the Consumer Productivity Dividend.[38] AT&T concludes that, had price caps been in effect from 1986 to

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34 AT&T Comments at Appendix A, Part II. AT&T's prospective analysis spans 1990-1993.

35 Id. at Appendix A, Part III.

36 This method of establishing a cap for common line costs has been debated in the record, but has never been a Commission proposal. See Further Notice, 3 FCC Rcd at 3291 (para. 184)(proposing to adjust for demand stimulation) and Second Further Notice, 4 FCC Rcd at 3222 (para. 723)(proposing a combination per minute and per line cap to reflect demand stimulation).

37 AT&T Comments at Appendix A, 2-4. Since this portion of AT&T's analysis is an historical study requiring AT&T to derive a productivity offset that would exactly equal actual rate of return experience, no adjustments to revenues were required in recognition of the proposed automatic stabilizer. Id. at 3 n. *.

38 Id. at Appendix A, 2-4.

1989, the difference between the Commission's proposed 2.5 percent proposed productivity offset and the 7 percent offset it calculates based on the cap proposed in the Second Further Notice would have resulted in rates that are $4.8 billion higher than those actually produced by rate of return regulation.[39]

30. The second part of AT&T's model is a prospective view of the switched access rates price cap regulation could produce from 1990 through 1993. As in the historical portion of its study, AT&T compares switched access revenues that can be expected under price caps with switched access rates that could occur under rate of return regulation. Unlike the historical portion of the study, the prospective portion presents only two views of a LEC price cap plan: (1) a common line cap using the simple average of the per minute and per line approaches, as advocated in the Second Further Notice; and (2) a per line cap on common line rates. AT&T makes a number of assumptions in forecasting 1990-1993 LEC industry performance. For example, in computing its rate of return projections, AT&T assumes that changes in exogenous costs include the phase-down of subscriber plant factor to 25 percent in 1993; the phasing-out of embedded inside wire through 1993; the decrease in depreciation levels associated with the expiration of reserve deficiency amortizations in 1992; and the phase-in of Category 3 (Local Dial Switching) Separations changes from 1988 to 1993. Moreover, it assumes that the subscriber line charge rate will remain at $3.50 per line for residential and single-line business customers, and a maximum of $6.00 per line for Centrex customers and multi-line business customers. AT&T also assumes that the composite rate of growth in lines will continue at 3 percent per year.[40]

31. In determining its price cap projections, AT&T assumes that the GNP-PI increases at 5 percent per year and the productivity offset (including the CPD) is set at 3 percent. It further assumes that categories of exogenous cost changes are the same as those assumed for rate of return. In solving for the productivity offset that would be necessary to yield price cap revenues equal to rate of return revenues, AT&T computes revenue

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39 Id. at 3, 9-10 and Appendix A at 4. A number of parties have cited AT&T's historical calculation of a 7 percent switched access productivity offset as a more credible number than the Commission's 2.5 percent. See, e.g., MCI 12-13, 16.

40 As part of its prospective study, AT&T forecasts nontraffic sensitive costs by starting with the 1989 revenue requirement (less inside wire) and assuming it will increase at 5 percent per year. AT&T projects 1990-1993 revenue requirements for traffic sensitive costs by starting with the 1989 revenue requirement and increasing it by the percentage growth in traffic sensitive minutes of use, and then reducing that amount by 1.5 percent per year. AT&T Comments at Appendix A, 10-11.

differences before making any adjustments required by the automatic stabilizer. Once total revenue differences are derived, AT&T applies the stabilizer, if applicable.[41]

32. The findings AT&T makes with regard to its prospective study are presented in the form of a series of tables appended to its comments.[42] AT&T isolates three variables -- nontraffic sensitive cost growth, growth in traffic sensitive costs, and demand growth -- and presents what it argues is a reasonable range of values for each of these variables. The first three tables present 27 possible outcomes of the comparison between price cap regulation and rate of return if common line is capped on the basis proposed in the Second Further Notice. The next three tables present 27 possible outcomes of the comparision process if common line is capped on a per line basis. The last table graphs how switched access rates can be expected to change, given different demand growth levels.

33. Using the common line cap proposed in the Second Further Notice, AT&T argues that the most reasonable set of assumptions it can make regarding switched access rates results in a productivity offset of 5.71 percent.[43] AT&T argues that by imposing a productivity offset of 2.5 percent, LEC customers will pay switched access rates that are $5 billion higher than rate of return would have produced. Thus, for price cap regulation to equal rate of return, AT&T states that the productivity offset would have to equal 5.71 percent. If common line rates were capped on a per line basis, AT&T states that LEC customers would pay $ 2.5 billion more than under rate of return over the 1990-1993 period.[44] For aggregate rates to be the same as

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41 Compare id. at Appendix A, Table A-1, Lines 5 and 7 with Line 9.

42 Id. at Appendix A, Tables A-1 through A-7.

43 Id. at Appendix A, Table A-1 (traffic sensitive costs per minute are declining 1.5 percent, nontraffic sensitive costs are growing 5 percent, and demand is growing 8 percent). AT&T argues that its assumptions for cost and demand changes are both reasonable and conservative. According to AT&T, traffic sensitive costs from 1986 to 1989 declined 3.2 percent. In its matrix of possible outcomes, AT&T utilizes a range of traffic sensitive cost decreases of -3 percent, -1.5 percent, and zero. AT&T also argues that nontraffic sensitive costs grew on average 5.2 percent annually from 1986 to 1989, with lower growth of 3.1 percent forecasted for 1989. AT&T selected nontraffic sensitive cost variables of 3.5 percent, 5 percent, and 6.5 percent. AT&T states that access demand has grown 12.6 percent annually over "recent years," and that forecasted growth for 1989 is above 11 percent. AT&T selected demand growth variables of 6 percent, 8 percent, and 10 percent. Id. at Appendix A, 4-5.

44 Id. at Appendix A, Table A-4 (using the set of assumptions AT&T finds

under rate of return, AT&T calculates the productivity offset for the per line approach would have to be 4.2 percent.

34. According to AT&T, the prospective analysis of price cap regulation over the 1990 to 1993 period reveals that, as nontraffic sensitive costs increase, the difference between price cap regulation and rate of return decreases. AT&T also finds that, as demand growth increases, the difference between rate of return and price cap regulation becomes larger.[45] At the most extreme, AT&T calculates that LEC customers would have to pay between $1.3 billion and $7.3 billion more under price cap regulation than under rate of return, depending upon the assumed growth rates for costs and demand.[46] These differences translate into productivity offsets of 3.65 percent and 7.75 percent, respectively, according to AT&T.[47]

35. AT&T employs an historical analysis to derive a special access productivity factor, which constitutes the third and final part of its model. To develop a comparison of the special access rates experienced under rate of return versus those rates that would have prevailed under the proposed price cap plan, AT&T uses a representative set of special access demands. These access demands reflect those quantities of special access that AT&T anticipates it will use in 1989 from the BOCs. The results of this study indicate that AT&T's special access costs under the proposed price cap plan -- with a 3 percent productivity offset -- would have exceeded the costs under rate of return regulation by approximately $224 million from 1986 to 1989.[48] AT&T contends that a productivity offset of 4.6 percent would have been required in the basket containing special access rates for rates under price cap regulation to equal rate of return results.[49]

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most reasonable -- nontraffic sensitive costs grow 5 percent per year, traffic sensitive costs decline 1.5 percent annually, and demand grows 8 percent).

45 Id. at Appendix A, 7-8.

46 Id. at 3, 20.

47 Id. at Appendix A, Tables A-2 and A-3.

48 Id. at Appendix A, 15.

49 In determining special access under rate of return, AT&T assumes that the productivity offset used to calculate expenses under the proposed price cap plan was 3 percent and that the changes in GNP-PI were the reported percentage change in the GNP-PI index from the second quarter to the second quarter of each year. Exogenous changes, it says, were computed and accounted for in the annual PCI adjustments.

36. From its historical and prospective analysis comparing the actual or likely performance of rate of return to price cap regulation, AT&T draws several conclusions. First, AT&T argues, the common line formula proposed in the Second Further Notice will permit carrier common line rates to increase as demand rises (instead of falling as demand rises), thereby enabling the LECs to earn exorbitant profits from their switched access rates.[50] Second, AT&T argues that the proposal to calculate the ceiling on the carrier common line rate, by calculating the cap on a total common line and subtracting an end user "per minute" charge, further exacerbates the tendency of the proposed cap to distort underlying economic relationships.[51] In addition, AT&T argues that even if the common line formula is revised to incorporate what it views as the correct, per line approach, the proposed productivity offset would continue to be inadequate, and would have to be increased.[52] Each of these arguments is summarized, below.

37. In AT&T's view, the Commission erroneously relies on historical Bell System LEC productivity studies to support its proposal for a common line price cap that averages the per minute and per line approaches when in fact, a substantial portion of the "output" measured in the historical studies was on lines, rather than minutes of use of those lines.[53] AT&T argues that if the historical studies measured carrier "output" inconsistently with the implicit "output" under the proposed LEC price cap system, there is no logical basis to the claim that any Bell System historical productivity measurement is either applicable or fully reflects the effects of demand growth on common line per minute costs.[54]

38. AT&T says that this conclusion follows from the mechanics of the common line adjustment mechanism. According to AT&T, the cap for carrier common line rates is determined by applying the formula to total common line revenue requirement in the base period calculated on a per minute basis (using minutes from that base period), and deriving the capped carrier common line rate per minute by first subtracting the end user charges (also expressed on

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50 Id. at 4, 6-9.

51 Id. at 14-17.

52 Id. at 4, 21.

53 Id. at 18-19 (arguing that the Christiansen study used revenues as a surrogate for output, and that the revenues were largely composed of line charges).

54 Id. at 18-19. See also MCI Reply at 23-24 (arguing that, contrary to the Commission's view, it is not clear that historical LEC productivity growth stemmed from growth in demand).

a per minute basis).[55] However, AT&T says that under the proposed formula, demand growth has two effects on capped carrier common line rates that operate quite differently. First, says AT&T, the 50 percent weight given to the per line method in the proposed formula tends to reduce the common line cap in partial response to increased minutes per line. Second, it says that demand growth has the effect of reducing the "per minute" end user charge and thus tends to increase the permissible carrier common line rate per minute under the formula.[56] AT&T argues that whenever carrier common line revenues represent less than half of the total common line revenues, the second effect -- higher carrier common line rates -- tends to predominate. AT&T further states that the second effect will predominate, since carrier common line revenues are less than half of total common line revenues on an industry average basis.[57]

39. AT&T therefore argues that the proposed formula produces higher carrier common line rates with demand growth contrary to all past practice and notwithstanding the demand growth adjustment embodied in the per line portion of the formula. It says that this increase occurs despite the fact that the underlying costs of maintaining and installing lines may not have increased. According to AT&T, the higher access rates and revenues would result solely from the fact that more minutes of interexchange traffic are traversing the LECs' nontraffic sensitive lines.[58]

40. AT&T maintains that, although the proposed common line formula accounts for 50 percent of demand growth due to "exogenous" demand stimulation, the simple fact is that adjusting for only the partial effects of growth will lead to substantially higher carrier common line rates than would otherwise occur. According to AT&T, the common line charges that recover the costs of the LECs' nontraffic sensitive interstate plant should be capped on a per line basis, not on a total common line rate per minute, thereby including a full adjustment for demand growth.[59] AT&T argues that

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55 AT&T Comments at 14.

56 Id. at 14-15. But see USTA Reply, Attachment B (Ernst and Whinney Analysis) at 7 (a drop in the "per minute" end user charge is a pro-consumer result).

57 AT&T Comments at 14-17.

58 Id. at 16-17. See also MCI Reply at 23 (there is no justification for allowing a LEC to "rake in" ever higher common line revenues just because demand is growing); Ad Hoc Comments at 14-15 and ETI Report at 19-20 (capping common line rates on a half per minute basis essentially negates the productivity offset).

59 AT&T Comments at ii, 6-7.

capping common line on a per line basis would not deny the LECs incentives to increase efficiency, because any reduction in the costs to install or maintain lines would accrue entirely to the earnings of the company that achieved the reduction. AT&T further argues that if this Commission adopts the per line method for the common line cap, one additional modification to the formula, a larger productivity offset, continues to be necessary. AT&T argues for an offset of approximately 3.7 or 3.8 percent to be applied to the two switched access baskets.[60]

41. Other parties, joining in the critique of the proposed common line formula, make slightly different arguments than AT&T. MCI, for example, cites the problems AT&T has identified with the formula and concludes that common line costs are simply not amenable to price cap regulation. According to MCI, common line should continue to be regulated under rate of return.[61] Ad Hoc and its consultant, ETI, argue that the Commission's proposed common line formula splits the growth in carrier common line demand on a 50-50 basis (splitting the saving associated therewith) between the LECs and interstate access customers. However, says Ad Hoc, as ETI demonstrates (based on a model using the same types of limiting assumptions used by the Common Carrier Bureau to clarify the new carrier common line price cap), the effect of the formula is to reduce the productivity offset for the carrier common line basket to zero.[62] As a result, it says, at 1989 levels, consumers would be required to forego some $313.67 million annually under the hybrid carrier common line proposal.[63] Ad Hoc argues that this "windfall" would flow to LECs without any countervailing benefit to consumers. The failure to balance carrier and consumer interests, it says, could not be more blatant. It concludes that this Commission should forego entirely the effort to develop a comprehensive price cap scheme for common line costs.[64]

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60 The proposed offsets include the Consumer Productivity Dividend. Id. at iii, 4, 21 (arguing that if AT&T's modifications are not made, the stabilizer will ameliorate, but not eliminate, higher access rates). AT&T does not attempt to reconcile the 3.2 percent per line productivity offset it calculates in the historical analysis with the 4.2 percent it calculates in the prospective part of the study. Compare id. at Appendix A, 4 with Table A-4.

61 MCI Reply at 23-24.

62 Ad Hoc Comments at 14-15, 38-39.

63 Id. at 15; Ad Hoc Comments and ICA Comments, ETI Report at 20-22.

64 Ad Hoc Reply and ICA Reply, ETI Report at 29-30. See also API Reply at 10.

42. The California PUC also argues that the cap on common line costs be implemented on a per-line basis rather than through "formulas based on elaborate combinations of costs per minute of access and demand growth projections."[65] The LECs' costs in providing common line varies as a function of the number of lines, not access minutes, it says, so that increases in interstate calling volumes should result in reduced per-minute charges flowed through to consumers. At the same time, it argues, LECs should not be penalized when interstate calling volumes decline. California PUC further argues that the common line formula proposed in the Second Further Notice would add unnecessary uncertainties to LEC earnings and thereby weaken managerial incentives to address costs per line.[66] Hawaii endorses the California PUC's views on common line and says it agrees with AT&T that the proposed formula would lead to artificially high access rates in areas with high rates of growth in minutes of use per line, a result that interexchange carriers might use as a justification for departures from geographically averaged rates.[67]

2. The USTA Rebuttal

43. One of the more comprehensive criticisms of AT&T's attempts to define the correct size of the productivity offset was filed by USTA. USTA says that AT&T does not cite its input sources, or display its methodology, or justify its assumptions.[68] As such, says USTA, AT&T's study fails the basic analytical test of using available data and a clearly specified methodology to produce results. To support its contentions, USTA offers two critiques of AT&T's study: one prepared by Ernst and Whinney, and another prepared by National Economic Research Associates, Inc. (NERA).

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65 California PUC Comments at 3-5. California PUC says that the proposed formula applicable to the carrier common line element is confusing. It asserts that several key variables of the formula, such as the "W", delta "Z", and "R" are either undefined or defined only with implicit reference to the AT&T price cap formula. See also Colorado OCC Comments at 8-9; Hawaii Reply at 16-17.

66 California PUC Comments at 2-3.

67 Hawaii Reply at 15. If the proposed carrier common line formula were to be implemented now, says Hawaii, GTE Hawaiian would collect excess revenue from subscriber line charges. This, in turn, it says, would impact the per-minute portion of the formula, and would result in an additional revenue assignment to the interexchange carrier if any growth occurs in the market.

68 USTA Reply at 16.

44. Ernst and Whinney reviews both the historical portion of AT&T's analysis of the productivity offset, as well as the prospective portion. Ernst and Whinney lists a number of problems it sees with AT&T's historical analysis. According to Ernst and Whinney, AT&T: (1) uses erroneously low initial demand numbers, thereby overstating initial rates, and increasing the difference in revenues that would have accrued under the two different modes of regulation; (2) uses ratemaking minutes instead of total minutes, treating the substantial shift from nonpremium to premium minutes that occurred with the introduction to equal access as an increase in productivity;[69] (3) employs an incorrect base year that overlaps the initial price cap year by five months in a way that overstates productivity; (4) did not account for minutes of use that can be attributed to demand stimulation from regulation-based cost decreases (i.e., from exogenous cost changes); and (5) employs historical demand growth rates of 14 percent, when in its efforts to calculate a productivity offset for itself, AT&T employed only a 7 percent growth factor.[70] Ernst and Whinney states that the numerous flaws identified in the historical study AT&T submitted demonstrate that the 7 percent productivity offset AT&T claims would have been needed in the 1986-89 period is substantially overstated.[71]

45. With regard to the prospective portion of AT&T's analysis of the productivity offset, Ernst and Whinney, as well as NERA, find a number of alleged flaws that result in AT&T's calculation of a productivity offset well above 2.5 percent. Ernst and Whinney argues that AT&T failed to provide information on the sensitivity of its results to the size of the assumed

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69 Ratemaking minutes are defined as premium access minutes plus 45 percent of non-premium minutes. In exchanges where equal access has not yet been made available to OCCs, and where the quality of their access is technically inferior to AT&T's, this Commission treats their access minutes as being equivalent to 45 percent of premium access minutes for ratemaking purposes. See BellSouth Reply at 11; Pactel Reply at 26; NYNEX Reply at 8. NYNEX argues that AT&T's approach of using only ratemaking minutes assumes that the revenue and price effects resulting from the conversion to equal access, and the corresponding shifts from non-premium to premium minutes of use will continue, despite the fact that most of this conversion is now complete. According to NYNEX, building in the effects of the past shifts in the range of 2 percent a year, as AT&T has done, gives a totally distorted picture of the productivity that can be expected during the period in which price caps will be implemented.

70 USTA Reply at Attachment B (Ernst and Whinney Analysis), 2-3 (also finding that AT&T employed an incorrect base year in calculating exogenous adjustments).

71 Id. at 1.

growth in GNP-PI. According to Ernst and Whinney, had AT&T assumed GNP-PI growth of 3 percent annually, instead of 5 percent annually, the revenues generated under the price cap option would decrease by $2 billion from the amounts calculated by AT&T for the 1990-1993 period.[72] Both NERA and Ernst and Whinney also argue that the AT&T analysis uses a stepped-up GNP-PI growth figure, relative to historical trends, but fails to step up the size of revenue requirements that would be realized in the period from 1990-1993.[73]

46. Both NERA and Ernst and Whinney also disagree with AT&T's view of probable changes in switched access costs in the 1990-93 period. Ernst and Whinney argues that the 3.5 percent to 6.5 percent range AT&T selected as its estimate of nontraffic sensitive cost growth is too broad and overstated on the high end.[74] According to Ernst and Whinney, historical, post-divestiture cost growth has averaged 6 percent per year.[75] Ernst and Whinney also take issue with AT&T's estimates that traffic sensitive costs could change between -3 percent and 0 percent annually over the next three years. Ernst and Whinney argues that traffic sensitive costs will grow, not decline, 1 percent annually.[76] Similarly, NERA argues that AT&T's traffic sensitive cost growth estimates are far too low. NERA, reviewing data submitted in previous rounds, as well as data published by the Commission, finds that traffic sensitive costs have recently grown between 2 and 2.24 percent per year.[77] NERA estimates that nominal traffic sensitive costs will rise between 3.1 and 3.6 percent per year from 1990-1993.[78]

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72 Id. at 3-5.

73 Id.; USTA Reply, Attachment C at 5-6 (arguing that in periods of high inflation, noncapital costs and the costs of new construction increase rapidly, and that investors demand a higher return). See also BellSouth Reply at 18; US West Reply at 15-16.

74 See also BellSouth Reply at 23.

75 But see Ad Hoc Reply and ICA Reply, ETI Report at 31 (claims about nontraffic sensitive cost growth are unquantified and unsupported).

76 USTA Reply at Attachment B, 3-5 (citing the Monitoring Report as evidence of a growth in costs.) See Staff of the Federal-State Joint Board in CC Docket 80-286, Monitoring Report in CC Docket 87-339, March 1988. See also BellSouth Reply at 19-23; Pactel Reply at 29-30; Bell Atlantic Reply at 12-16; GTOC Reply at 2-9.

77 USTA Reply at Attachment C, 6-8 (citing Bellcore II and FCC Monitoring Report).

78 Id. at 20-23.

47. Both NERA and Ernst and Whinney also find problems with the way AT&T analyzed demand in its prospective study. Ernst and Whinney finds that, as in its historical study, AT&T employed ratemaking minutes instead of total minutes.[79] Ernst and Whinney argues that AT&T's estimated 6-10 percent demand growth for 1990-1993, because it is based on post-divestiture trends, should be decreased to a lower growth rate to acknowledge that the post-divestiture period witnessed large demand increases stimulated by regulatory changes.[80] NERA presents a lengthy discussion, grounded in current econometric literature, that finds slower demand growth adversely affects total factor productivity. According to NERA, the combination of slower demand growth and changing separations treatment for traffic-sensitive costs that have already been planned for 1990-1993 argue for a productivity offset that is lower than one for 1986-1989 that would have produced results equal to rate of return regulation.[81]

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79 Id. at Attachment B, 3-5.

80 Id. at Attachment B, 3-5. See also BellSouth Reply at 11; Pactel Reply at 26; NYNEX Reply at 8.

81 Id. at Attachment C, 20-23. Drawing on recent econometric studies, NERA reasons that the two most important factors influencing growth in total factor productivity subsequent to divestiture are growth in demand and the conversion to electronic switching. According to NERA, if demand grew 5 percent more in the post-divestiture period as compared to a long-run average, total factor productivity was overstated by 2 percent. See also Bell Atlantic Reply at 14-16. But see Ad Hoc Reply at 4; Ad Hoc Reply and ICA Reply, ETI Report at 2, 5, 31-37. ETI contends that the LECs' suggestion that they are somehow penalized for the termination of the post-divestiture transition to subscriber line charges and the resulting demand stimulation by the 2.5 percent productivity factor is misconceived. ETI says that the 2.5 percent estimate of productivity is emphatically not based upon any post-divestiture data, but instead is based on productivity studies going back forty years, ending ten years ago. AT&T, it says, disproves the LECs' assertions that the productivity offset derived from these "vintage" Bell System productivity studies somehow implicitly anticipated the post-divestiture demand stimulation by noting that lines -- not minutes of use -- were the output variable in these historical studies. Moreover, says ETI, the LEC assumption that all of the post-divestiture stimulation in demand occurred as a result of the interstate access charge program is false. According to ETI, annual increases in demand reflect trends that will continue to occur in an increasingly price-rivalrous, information-intensive long distance market, particularly given the increasing pricing flexibility that the market leader -- AT&T -- now enjoys.

48. NERA and Ernst and Whinney argue that, had AT&T properly conducted its analysis, the value of the productivity offset needed to equal rate of return performance in 1990-1993 would be much less than that presented by AT&T.[82] According to NERA, had AT&T correctly linked GNP-PI growth to switched access cost growth, and employed a more realistic growth rate for traffic sensitive costs, price cap regulation could be expected to lower rates by $1 billion more than rate of return. Similarly, Ernst and Whinney finds that if AT&T had used a more reasonable set of input values -- GNP-PI growing at its actual post-divestiture growth rate of 3.6 percent, minutes of use growing at the long-term rate of 7.5 percent (ignoring the post-divestiture growth spurt), nontraffic sensitive costs growing by 6 percent, and traffic sensitive costs growing by 1 percent -- price cap regulation would result in rates $1 billion lower than rate of return during 1990-1993.[83] Since USTA and its consultants disagree with AT&T's view of the size of the productivity offset needed to produce consumer benefits, they also disagree with AT&T's views on the common line formula itself. Ernst and Whinney files a chart purporting to demonstrate that, contrary to AT&T's view, common line rates under the proposed formula will fall as demand increases.[84] USTA argues that the proposed formula reduces by half the common line demand-related productivity available to the LECs, thereby diminishing the productivity gains LECs can expect to achieve.[85] USTA characterizes the Commission's proposed formula as an attempt to "reward" both LECs and interexchange carriers, rather than attempting to separate the demand stimulation produced by LECs themselves from that produced by interexchange carriers.[86]

3. Critique of the Second Further Notice

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82 The only assumption made by AT&T that Ernst and Whinney found reasonable was AT&T's estimate of 3 percent growth in lines. NERA states that AT&T's estimate of nontraffic sensitive cost growth of 5 percent was roughly correct, as well as AT&T's estimate of 8 percent growth in switched access demand (although AT&T never properly related this number to productivity growth). USTA Reply, Attachment C at "Summary". See also SWB Reply at 39 (AT&T uses an inappropriate time period to base its future projections); BellSouth Reply at 10; Bell Atlantic Reply at 10-14; US West Reply at 14; Centel Reply at 21.

83 USTA Reply at Attachment B, 6.

84 Id. at Attachment B, 6 (citing Appendix D to the Ernst and Whinney analysis).

85 Id. at 20 (adding that demand-induced productivity gains are not likely to be substantiated in the next few years as demand growth slows).

86 Id. at 20-21.

49. Apart from arguments centered on AT&T's analysis of post-divestiture LEC productivity, parties argue that the Commission's productivity analysis in the Second Further Notice overlooks a number of factors that have resulted in a productivity offset that is too low. MCI agrees with AT&T that over the next several years LEC productivity, and thus cost decreases, can be expected to exceed the historical norm for the telecommunications industry overall.[87] According to MCI, the inadequacy of the proposed productivity factor is clearly demonstrated by LEC pricing behavior. In recent access tariff filings, it says, the LECs have generally felt constrained to reduce their access charges, sometimes significantly.[88] In its reply, MCI reiterates that the proposed productivity factor and the CPD is "artificially and indefensibly" low.[89] By any estimate, it says, implementation of the price cap proposal for the LECs would impose tremendous costs on LEC access service users, particularly ICs and all of their ratepayers. MCI maintains that such an unearned transfer of wealth from ratepayers to the LECs would negate this Commission's efforts to rationalize the access charge scheme through direct assignment of a portion of the local loop costs to end users.[90]

50. State government agencies also argue that the productivity offset proposed in the Second Further Notice is too low. For example, New York DPS states that the available evidence suggests that carriers' productivity relative to that embodied in the general inflation index historically has been greater than 2.5 to 3.0 percent and has been increasing.[91] New York DPS contends that over time, an inaccurate productivity offset will allow general prices to diverge excessively from

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87 MCI Comments at 47. See also Baseman, "The Choice of Productivity Offsets for Rate Cap Regulation," July 1988.

88 MCI Comments at 47. MCI also points to evidence found in a recent Report on the Results of Operations of Pacific Bell for 1987, submitted to the California PUC by Pacific Telesis. This report, says MCI, shows that maintenance expense per $100 of average telephone plant in service dropped from $12.38 in 1982 to $6.85 in 1987, a decline of 8.9 percent per year. Moreover, it says, traffic expense per $100 of average telephone plant in service dropped from $2.26 in 1982 to $1.16 in 1987, or 9.7 percent per year. MCI contends that other expense categories also declined. Id. at 47-48.

89 MCI Reply at 12.

90 Id. at 16-17.

91 New York DPS Comments at 3-4.

costs.[92] NARUC similarly believes that the proposed LEC productivity factor is "far too low" and will facilitate LEC profit padding.[93]

51. Hawaii argues that the proposal to adopt LEC price cap regulation contains an "entirely inadequate approach to productivity factors in an environment of declining unit costs."[94] In particular, it argues that the Commission has overlooked significant potential productivity gains that will be realized through growth in network capacity, increased economies of scale, and reductions in both operating and investment costs.[95] On that basis, it contends that abandoning rate of return at this point is particularly suspect because cost trends in the telecommunications industry indicate that unit costs are declining. DC PSC agrees that a LEC productivity standard cannot be determined from the record established in this proceeding.[96] According to DC PSC, due to the fact that LEC productivity studies since divestiture are unreliable, the Commission has been forced to rely on the pre-divestiture analysis of total Bell System productivity. Unfortunately, it says, such studies are based upon combined AT&T and LEC results, and this Commission has no assurance that the conclusions of these studies, with their combined productivity analyses, are valid for the LECs alone.[97]

52. Ad Hoc asserts that the Commission's productivity figure is "dangerously low", unsupported by the record as a whole, and creates an

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92 New York DPS believes that the problem of an inaccurate productivity offset would be mitigated using an approach similar to that developed in the New York incentive regulation plans. Under these plans, multi-year revenue requirements based on specific rates of return are established to replace inflation and productivity indexes. Id. at 5.

93 NARUC Reply at 10. See also Colorado OCC Reply at 7-8.

94 Hawaii Reply at 2; Indiana UCC Comments at 18-21, 25-32.

95 Hawaii Reply at 6. See also NY Clearinghouse Comments at 4-8 (Commission's conclusion that technology will not affect productivity is wrong). But see Pactel Reply at 22-24.

96 DCPSC Comments at 2. See also Florida Citizens Comments at 5-6. Florida Citizens urges us to require LECs to submit their budgets to us for review before adopting a productivity factor for them.

97 See also Justice Reply at 19-20.

imbalance in favor of the carriers and against consumers.[98] Ad Hoc is particularly concerned that if the productivity factor proves too low and results in unreasonable returns to LECs, consumers will have no effective means of redressing the imbalance and will pay billions of dollars in unwarranted revenues to LECs.[99] On the other hand, it says, the carriers are protected against unreasonably low returns by the constitutional prohibition against confiscation, and by this Commission's "standardless willingness" to entertain above-band and above-cap filings. TCA adds that the detrimental effects of the productivity factor on consumers will be exacerbated if this Commission persists in the proposal not to require the LECs to refund excessive earnings.[100]

53. Ad Hoc further maintains that while the Commission recognizes that its productivity figure cannot work for the LECs, it has not taken obvious steps to rectify the lack of data to support a LEC productivity offset.[101] Instead, says Ad Hoc, the Commission "cling[s]" to its unsupportable 2.5 percent historical figure because it has not been "persuaded" that this figure is unreasonable.[102] Ad Hoc adds that the Commission's summary and misguided approach to the record is not simply an exercise of agency discretion, expertise or informed judgment. Indeed, it says, the productivity offset is not a mere detail of price caps. According to Ad Hoc, a stringent productivity offset is the central engine driving the efficacy of price caps in enhancing efficiency. Ad Hoc argues that by failing to engage in rigorous analysis and by failing to require the best possible data from the LECs, the Commission has abdicated its central regulatory responsibility.[103]

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98 Ad Hoc Comments at 6-7. See also ICA Comments at 10; TCA Comments at 13-15; API Comments at 3, 6-7.

99 Ad Hoc Comments at 7-8.

100 TCA Comments at 14.

101 Ad Hoc Reply at 3 and ETI Reply Report at 1-8, 10-11, 34-37. Ad Hoc says that it would be well within this Commission's power to require the LECs to submit the data needed to determine empirically what an appropriate productivity offset might be. For example, it says, we could require, within the context of a prescription proceeding of the kind authorized by Section 205 of the Communications Act, that the LECs submit full productivity data to enable us to set empirically based productivity offsets.

102 Ad Hoc Comments at 33-34.

103 Id. at 8-9. See also University Comments at 4-5 (urging the Commission to compare its price studies with other available measures for the business economy).

54. In addition to arguments that the productivity offset is too low, ETI challenges the Commission's analysis of studies placed in the record leading up to the Second Further Notice. ETI specifically argues that the AT&T and Bellcore studies of LEC productivity, submitted in 1988, do not "collapse" into any value that could reasonably be construed to support the 2.5 productivity factor as the Commission had suggested in the Second Further Notice. Specifically, it maintains that the analysis of the Bellcore studies shows that just one adjustment made by AT&T, for the demand effects related to the change in treatment of WATS access lines, impacts the Bellcore study results by 2.57 percent (or more than the total value of the long term productivity estimate). Moreover, says ETI, the dollar value of the other errors in the Bellcore studies nets out to an adjustment of over $840 million. According to ETI, the Bellcore analysis of exogenous post-divestiture price movements understated LEC productivity by this amount.[104] ETI further claims that while the Second Further Notice includes a thorough evaluation of the errors that AT&T highlighted in its review of the Bellcore study, it makes no such evaluation of the supposed errors in AT&T's own analysis.[105] Indeed, it says, this Commission makes no definitive findings on the largest point of disagreement between the LECs and AT&T concerning this study, namely, the selection of the starting point for a price analysis at the inception of access tariffs or one year later when better data was available.

55. In addition to disagreeing with AT&T's analysis of the effects of the proposed cap on common line rates, LECs disagree that a per line cap on common line rates is the solution. USTA argues that a per line approach would place all the productivity risk on LECs and would curtail incentives to modernize the local loop. According to USTA, a productivity offset in the formula plus a full adjustment for demand growth inherent in a per line approach is redundant. USTA argues that the productivity offset selected by the Commission is based on historical analysis of total company operations, which include common line functions and nontraffic sensitive costs.[106] The BOCs generally agree that the proposed common line formula is a better alternative for recovering common line costs than AT&T's per line proposal,

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104 Ad Hoc Comments and ICA Comments, ETI Report at 11.

105 Id., ETI Report at 12.

106 USTA Reply at 22 n.44 (arguing that a per line approach with a productivity offset set at zero, but including an adjustment for inflation, would tend to understate costs since productivity of lineside outside plant and labor tends to fall below that of the general economy).

despite concerns that the Commission's formula will increase the productivity requirement in the common line basket without an equivalent offset elsewhere.[107]

56. Similar to the BOCs, the independent telephone companies reject the per-line proposal of AT&T. However, in contrast to most of the BOCs, the independent LECs oppose the proposed common line adjustment as both unnecessary and unreasonable.[108] Most independents argue that common line productivity is fully reflected in the 2.5 percent productivity offset and that further adjustment of the common line formula will result in the double counting of productivity gains. For example, SNET claims that the 2.5 percent productivity factor already incorporates common line demand growth since growth in minutes per line is embedded in the long term Bell System productivity studies upon which the 2.5 percent factor is based. Moreover, it says, common line and total productivity achieved by the LECs in recent times has been attributable to the Commission's program to increase the proportion of nontraffic sensitive costs recovered by subscriber line charges. However, since the last of a series of subscriber line charge increases has already been made effective, SNET argues that rate or demand adjustments to account for the effect of this regulatory action are no longer necessary.[109]

57. Independent LECs raise various other arguments against the common line formula appearing in the Second Further Notice.[110] CBT argues

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107 SWB Reply at 36; NYNEX Comments at 23; Ameritech Reply at 14; BellSouth Reply at 22; US West Reply at i. See also NYNEX Comments at 23 (proposing that this Commission create a second index, a CCL price cap, to form the basis for the Actual Price Index (API) calculation within the common line basket).

108 But see Contel Reply at 12 (the Commission's proposal is a better alternative than AT&T's per line approach).

109 SNET Comments at 7. See also Rochester Reply at 9; Centel Reply at 11-12; Contel Comments at 15; PRTC Reply at 28; USTA Comments at 30-31.

110 Centel argues that subscriber line charges should not be frozen when price caps are initiated, and should continue to vary under the set limits based on variations in costs per access line. It explains that the proposed computation of carrier common line charges under price caps would yield negative carrier common line charges if common line costs decline and all subscriber line charges are frozen. According to Centel, if a LEC currently has subscriber line charges below the limits but subsequently experiences sharp cost increases, recovery of the increased costs should be at least in part through higher subscriber line charges, pursuant to existing rules. Otherwise, it says, carrier common line charges would have to rise sharply, leading to more bypass. Centel Comments at 15. See also Hawaii Reply at 16-17.

that, if its per loop common line rates had been subject to the Commission's proposed formula since 1984, a productivity adjustment of -0.23 percent would have been necessary in order for CBT's 1988 carrier common line rate to equal the rate it filed under rate of return regulation.[111] CBT says this clearly demonstrates the unreasonableness of the proposed adjustment as applied to CBT. According to PRTC, with the proposed common line formula in place, it would have to sustain a common line usage growth rate of more than 20 percent annually in order to maintain its current revenues. This, it says, is far beyond any reasonable expectation.[112] Contel argues that the Commission's proposed common line formula would produce an unacceptable degree of volatility in the terminating carrier common line rate because, of the three rate elements in the common line basket, only the terminating minute rate would be subject to fluctuation under price caps.[113]

4. Productivity Performance of non-BOCs

58. Many of the independent LECs contend that this Commission should not expect smaller telephone companies to achieve the same productivity gains as larger telephone companies, and that this Commission should therefore employ a smaller productivity offset for non-BOC LECs. Few parties, however, submitted new data and analysis to support a lower offset.[114] CBT, and its

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111 CBT Comments at 7. CBT's productivity offset is drawn from a study of its own rates and costs developed by NERA and submitted as an appendix to its comments.

112 PRTC Reply at 27 and Appendix A ("Impact of Common Line Price Cap Formula on Puerto Rico Telephone Company", prepared for PRTC by Snavely, King & Associates, Inc.). The Snavely, King analysis contends that the unique characteristics of PRTC's serving area led the carrier to experience declining productivity on a per line basis in recent years. The analysis concludes that while the Commission's proposed formula, by averaging the per line and per minute approaches, is better for PRTC than AT&T's per line cap, the proposed formula would require such an enormous increase in demand for revenue to remain constant, that it would be impossible to build facilities to accommodate the demand.

113 Contel Comments at 15.

114 See, e.g., id. at 5-6; Alltel Reply at 13; Rochester Reply at 3-8; SNET Reply at 11; TDS Reply at 16 (all arguing that the third Bellcore study submitted in September 1988, disaggregating the results of the second Bellcore study, provides evidence of a 1 percent differential between BOC and non-BOC productivity).

economic consultant, NERA, were among the few who offered a study of independent LEC productivity. CBT's NERA study uses several different approaches to examine CBT's productivity.[115] The NERA study provides an analysis of CBT prices during the post-divestiture period using a methodology that it says "closely resembles that used in studies done by Bellcore and filed with the Commission."[116] After analyzing its results, NERA says that the productivity offset necessary for CBT's rates to equal rates actually experienced under rate of return from 1984 to 1988 was 0.3 percent per year. It maintains that using the same methodology, Bellcore estimates a relative productivity factor of 3.33 percent per year for the BOCs. NERA thus concludes that from 1984 to 1988, the productivity of CBT was roughly three full percentage points per year less than that of the BOCs. In 1987, CBT performed its own study of its productivity in the post-divestiture period. NERA says that it reviewed that study and made several improvements in methodology.[117] As a result, it says, it was able to derive its own estimates of CBT's total factor productivity for that period. According to these estimates, CBT's total factor productivity in the post-divestiture period is within half a percent per year of both the Bureau of Labor Statistics and American Productivity Center's measures of economy-wide productivity, much less than 2.5 percent per year above economy-wide productivity that the Commission estimates for LECs as a whole. CBT argues that the productivity offset for non-BOC LECs should be 1.5 percent.[118]

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115 CBT Comments, Attachment 1 ("Incentive Regulation and Estimates of Productivity", Prepared for CBT by NERA, June 9, 1989).

116 Id. at Attachment 1, page 6.

117 For example, in measuring the total factor productivity for the post-divestiture years for CBT, NERA uses the Total-Output method rather than the Gross Value Added method used by CBT. NERA argues that the Total-Output method is the best method to employ for appraising the total factor productivity for individual companies because it allows for the assessment of productivity improvements in purchase decisions and the efficiency of employing assets such as Material, Rents, and Services. According to NERA, the Gross Value Added method does not allow for a similar assessment. See id. at Appendix D, 1-2. A second major change in methodology from the CBT study is that non-income taxes are deflated using the GNP deflator. In addition, NERA uses an interstate access price index. Id.

118 Id. at i.

59. According to NERA, each approach indicates that CBT's productivity has grown much less rapidly than that of the BOCs. Therefore, it argues, the productivity factor for CBT should be substantially lower than for the BOCs. Indeed, NERA says that its quantitative results suggest that the differential should exceed one full percentage point per year. According to CBT, NERA's finding support its contention that productivity factors applied in cap adjustments must respond to the different economies of scale, different subscriber bases, different potentials for achieving productivity gains, and differing levels of economic volatility experienced by the LECs.[119]

60. Most non-BOC LECs simply argue there are good policy reasons for creating a lower productivity offset to apply to independents, although the arguments are sometimes inconsistent. For example, Contel argues that smaller companies are less likely to achieve productivity gains than larger carriers,[120] while CBT argues that the independents have already achieved productivity gains through wholesale network upgrades that larger carriers have not yet achieved.[121] Ronan argues that small company productivity will be much more volatile, a theme echoed by TUECA, NTCA, and TDS.[122] SNET asserts that a LEC's ability to post productivity gains is directly and positively related to whether it can generate economies of scale.[123] Other independents point to economic conditions in their relatively concentrated service areas as a principal reason for their inability to achieve the proposed productivity offset.[124]

61. PRTC also computed its own productivity. PRTC says that over the past ten years its productivity increased at a 0.95 percent annual rate, or more than one and one-half percent less than the rate proposed in the Second Further Notice.[125] In this study, Snavely, King & Associates attempts

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119 CBT Reply at 9.

120 Contel Comments at 4-5.

121 CBT Reply at 9-10. See also Centel Comments at 9-11; Iowa Comments at 5. Iowa says that for modern telecommunications, cost is not strictly a function of output. Instead, it says, technology is a cost that is determined by the types of services offered.

122 Ronan Comments at 4; TUECA Comments at 4; NTCA Reply at 2-3; TDS Reply at 16. See also USTA Comments at 38.

123 SNET Reply at 10 (adding that larger LECs also have considerably more intra-LATA toll calling, which is a highly productive service).

124 Centel Comments at 11; Lincoln Comments at 6.

125 PRTC Comments at 23 and Exhibit A (summarizing a study conducted by

to demonstrate that the proposed composite method of calculating the common line price cap will not permit PRTC to recover its common line access revenue requirement since PRTC is experiencing declining productivity on a per line basis. PRTC argues that, while other commenters focus on the disparity between BOCs and ITCs, there is no evidence to support uniform productivity adjustments regardless of carrier size and there is much theoretical and undisputed empirical support for the proposition that carrier size directly affects productivity.[126] Accordingly, it says, we should adopt a five-tiered productivity adjustment that accounts for the effects of size on productivity.[127]

62. In a study sponsored by Ad Hoc and ICA, ETI contends that for the most part, the claim by smaller LECs that the productivity offset is too high for them is not buttressed by economic data. Nonetheless, it says, the possibility does exist that smaller LECs' potential productivity is more constrained than the larger Tier 1 carriers. If this condition is true, says ETI, it reflects the Commission's failure to analyze LEC productivity trends correctly and further underscores ETI's view that the average productivity offset is too low to reflect the significant gains in network efficiency that larger LECs will realize during the four years of the proposed price caps plan.[128]

63. GTOC argues that the productivity offset for all LECs is too high, based on the Commission's insistence on basing the estimate of LEC productivity on pre-divestiture and integrated "Bell System" productivity rather than exchange carrier productivity. In fact, GTOC says, there is ample data in the record to support an estimate of LEC productivity. This data, it says, indicates that a lower productivity factor should be used for exchange carriers than for AT&T.[129]

Snavely, King & Associates, Inc.).

126 PRTC Reply at 22-26.

127 See PRTC Comments at 25-26. OPASTCO endorses PRTC's multi-tier productivity proposal. OPASTCO Comments at 16. See also SBA Comments at 23-24.

128 Ad Hoc Reply and ICA Reply, ETI Report at 8, 10, Appendix A. In Appendix A, ETI analyzes CBT's productivity study and concludes that if the study's reports are accurate they would undercut the design of the productivity adjustments.

129 GTOC Comments at 10. GTOC supports this conclusion on the basis of information supplied by the Christiansen study which includes an estimate for independent LEC productivity of only 1.9 percent. GTOC says that the Second Further Notice ignores the Christiansen findings. See also GTOC Reply at 8.

64. Illinois Telco argues that small and mid-size independent companies are typically unable to commit the resources to prepare detailed productivity analyses. Since the smaller companies will not be able to supplement the record with data demonstrating that a 1 percent differential exists, the only alternative, says Illinois Telco, will be to forego alternative regulation and continue under a rate of return environment. This, it says, will deprive many customers of the advantages of price cap regulation and clearly does not serve the public interest.[130]

C. Discussion

65. Establishing a reliable measure of LEC productivity has been a critical concern in this proceeding. This is so because any form of regulation that is based on the costs of production must take productivity gains into account.[131] In the case of the price cap method proposed for LECs, changes in the costs of production form the basis for determining movement in price ceilings. As part of its Further Notice, the Commission tentatively decided to employ the Gross National Product Price Index (GNP-PI), also known as the fixed-weight GNP deflator, as the most suitable measure of changes in the costs of factors of production for LECs.[132] The tentative selection of a

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GTOC further contends that while the Christensen study provides the most appropriate measure for non-Bell LECs, the second best estimate readily available is the overall Bell System estimate of 2.5 percent. It says that although the Bell System study fails to take the independent LECs into account, at least it includes all aspects of LEC production and is based upon broad historical data, and thus should be considered a highly reliable estimate.

130 Illinois Telco Reply at 2-5.

131 See Further Notice, 3 FCC Rcd at 3399-3400 (para. 363); see also Second Further Notice, 4 FCC Rcd at 2975 (para. 198).

132 Further Notice, 3 FCC Rcd at 3390-91 (paras. 347-349). In adopting the GNP-PI, the Commission tentatively rejected suggestions that it develop an index of the cost of factors of production specifically targeted to the telephone industry. The Commission tentatively found that development of such an index would be a difficult task that need not be undertaken if a broad-based index, like GNP-PI, could be used. The Commission's judgment in this regard appears to be confirmed by regulatory practice in other jurisdictions. For a description of recent regulatory reform in Great Britain based on the price cap model, see S.C. Littlechild, Regulation of British Telecommunications Profitability: A Report to the Secretary of State for Trade and Industry, (Littlechild Report) submitted Feb. 1983. For a description of the California price cap plan, see generally Before the Public Utilities

broad-based index reflecting changes in the cost of factors of production for a wide spectrum of economic sectors necessarily raised a second question that has become one of the central issues in this proceeding -- whether the GNP-PI reflects the entirety of productivity gains experienced by LECs, and, if not, by how much does LEC productivity exceed the national average.[133]

66. As described below, the record is replete with various productivity measures, each of which attempts to determine the quantitative measure of the amount by which LEC productivity exceeds that of the economy as a whole. We briefly review these submissions, to reflect on what we have learned about LEC productivity to date, recognizing that the absence of a quantitatively exact productivity measure is not fatal to the design of a workable price cap system since our plan includes adjustments for potential inaccuracies. We then turn to the current record, which features a study by AT&T purporting to identify, for the years since divestiture of the Bell Operating Companies, LEC productivity gains above those experienced in the economy as a whole. For reasons provided in the discussion that follows, we tentatively reject the conclusions of AT&T's study that the 2.5 percent productivity offset is too low, as improperly founded on unsubstantiated and unsupportable assumptions that tend to overstate LEC productivity gains. We tentatively conclude that no party to this proceeding has thus far submitted reliable and persuasive evidence that LEC productivity trends in the post-divestiture era have deviated from the long-term, historical productivity experience of 2.5 percent above that of the economy as a whole. We then offer two new pieces of evidence, compiled by our staff, concerning productivity trends in the post-divestiture era. These two studies reach different conclusions about LEC productivity in the post-1984 period, and we seek comment on how to harmonize them with the productivity record amassed in this docket and with our tentative selection of a 2.5 percent productivity offset. In addition, we review the extent of the evidence tending to support a different productivity offset for independent LECs, and we ask these companies to submit additional quantitative data to support their claim that they should be subject to a lesser offset.

Commission of the State of California, In the Matter of Alternative Regulatory Frameworks for Local Exchange Carriers (Decision 89-10-031), Interim Opinion (October 12, 1989).

133 See Further Notice, 3 FCC Rcd at 3400 (para. 364). The Further Notice explained this relationship as follows: if the cost of factors required to produce a unit of output increases by 5 percent, but productivity increases by 2 percent, then actual market prices need only increase by 3 percent to maintain the same level of producer profit. The 3 percent increase is the one we see reflected in the GNP-PI and other price indexes. Therefore, price indexes can be said to embody average, economy-wide productivity increases.

1. Review of the Record

67. At the most basic level, productivity may be considered as output per unit of input.[134] That is, productivity advances in a business are manifested by increased output from the same amount of resources, i.e., land, labor or capital (sometimes referred to as "factors"). Productivity advances can also be manifested by the same amount of output from decreased use of resources.[135] Whether from increased output or reduced use of resources, when a business is productive, the dollar cost of a unit of output declines due to the diminished resource requirement per unit of output.[136]

68. Productivity can be measured in different ways. In general terms, productivity is quantified by measuring the change in the costs of purchasing resources needed for production. For example, productivity can be measured by determining changes in output per employee or per employee hour. As discussed in the Second Further Notice, a productivity measure based on one factor of production, such as an employee hour, is known as a "one factor" productivity index. The Bureau of Labor Statistics's (BLS's) labor productivity index is an example of such an index. Other indexes measure output per some weighted aggregate of capital and labor. Still others, called three-, four-, and total factor productivity measures, add further inputs such as land and material and supplies to capital and labor to measure output per unit of input.

69. The Commission first looked to see if there existed any one measure of productivity on which it could rely on a going-forward basis, to determine whether a productivity differential existed and how large the differential was. For example, it considered the BLS's Multi-Factor Productivity Measure for Private Business,[137] as well as as the productivity estimates generated by the American Productivity and Quality Center (APQC).[138]

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134 Id. at 3400 (para. 366).

135 Id. at 3399 (para. 363).

136 Id. at 3339 (para 363). Of course, if the cost of resources required to produce a unit of output rises, the price reductions that would ordinarily flow from improved productivity may be offset by the increased costs of such resources.

137 See id. at 3406-07 (para. 383).

138 Id. at 3403 (para. 372), citing American Productivity and Quality Center, Multiple Input Productivity Indices. The APQC calculates two-factor productivity for the economy as a whole and for various manufacturing and service sectors, including communications.

After careful review, the Commission determined that these indexes were unlikely to reflect accurately productivity of carriers subject to price cap regulation.[139]

70. After rejecting the use of any available productivity indexes as not sufficient to its purposes, the Commission attempted to derive a measure of the productivity differential from available evidence. The Commission examined several historical studies of telecommunications industry productivity. Each study indicated that the productivity of the telecommunications industry exceeded that of the economy as whole. For example, a study of total factor productivity[140], prepared for AT&T by an outside consultant and filed in United States v. AT&T,[141] found that Bell System productivity from 1947-1978 was 2.1 percent greater than for the economy as a whole.[142] Another study of total factor productivity, performed by AT&T itself, provided confirmation that the telecommunications industry is a higher than average productive sector of the economy.[143] For example, during

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139 See id. at 3407 (para. 347)(the BLS index reflects the productivity average for the private non-farm sector, an overly broad category whose historical productivity has been substantially below the telecommunications sector); id. at 3403 (para. 372) (two-factor productivity measures are less likely to be accurate for particular industries).

140 Total factor productivity typically encompasses use of labor, capital, and raw materials as the relevant factors, and considers as many distinct outputs as necessary to portray the firm accurately. Id. at 3401 (para. 367). See also generally J. Kendrick & E. Grossman, Productivity in the United States 12-14 (1980); S. Fabricant, Problems of Productivity Measurement, in Measuring Productivity 32-33 (1984) AT&T, Bell System Productivity Study 1947-78 5-6 (Nov. 1979).

141 See Further Notice, 3 FCC Rcd at 3401 (para. 368) citing Testimony of L. Christensen filed in United States v. AT&T, Civ. Action No. 74-1698 (D.D.C. filed Nov. 20, 1974). As noted in earlier orders, the trial in that case terminated in the consent decree divesting the BOCs from AT&T. See United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

142 As described in the Further Notice, the study concluded that Bell System productivity grew at an annual rate of 3.2 percent during those years, compared to an economy-wide productivity increase averaging 1.1 percent. The Bell System's productivity advantage was therefore 2.1 percentage points over the rest of the U.S. economy. This differential increased during the interval studied, reaching 3 percent in the period 1966-1978. Further Notice, 3 FCC Rcd at 3401 (para. 368).

143 Id. at 3402 (para. 369) citing AT&T, Bell System Productivity Study

the years 1947-1978, AT&T found a productivity differential of 1.9 percent. Moreover, it found that its average differential masked a rising trend. During 1948-1965 the differential favoring the Bell System was 1.1 percent; from 1965-1972, it was 2.1 percent; and from 1972-1978, it was 3.9 percent.

71. The Commission noted other published studies.[144] One examined four-factor productivity within the Bell System for the period 1947-1976 and concluded that an average annual increase in productivity of 4.09 percent had occurred.[145] Another study, measuring total factor productivity of Bell of Canada found productivity increases of similar magnitudes to those reported for the United States, despite differences in the economic, technological, and regulatory environments affecting the companies.[146] Specifically, the study reported an average annual increase of 3.35 percent over the period 1952-1976, rising from 1.3 percent in the first five years to 4.5 percent in the last five. As stated in the Further Notice, although neither of these studies produced comparative data on the economy as a whole, both showed levels and trends of Bell System productivity entirely consistent with the other studies cited.[147]

72. To corroborate the findings of the above studies, the Commission cited other pieces of evidence. In the Further Notice, for example, it cited the APQC's calculation of productivity for the economy as a whole and for the communications industry alone that showed a communications

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1947-78 (Nov. 1979).

144 Id. at 3402 (para. 371).

145 Id., citing M.I. Nadiri & M. Schankerman, The Structure of Production, Technological Change, and the Rate of Growth of Total Factor Productivity in the U.S. Bell System, in Productivity Measurement in Regulated Industries (T. Cowing & R. Stevenson eds. 1981).

146 Id., citing M. Denny, M. Fuss & L. Waverman, The Measurement and Interpretation of Total Factor Productivity in Regulated Industries, with an Application to Canadian Telecommunications, in Productivity Measurement in Regulated Industries (T. Cowing & R. Stevenson eds. 1981). See also Second Further Notice, 4 FCC Rcd at 2992 (para. 227), discussing a second Bell of Canada study showing a productivity gain of 3.2 percent per year without netting out national average productivity growth. M. Denny, A. de Fontenay & M. Werner, Comparing the Efficiency of Firms: Canadian Telecommunications Companies in Economic Analysis of Telecommunications, L. Courville, A. de Fontenay & R. Dokell, eds. (1983).

147 Id. at 3402 (para. 371).

industry advantage in productivity of 2.2 percent from 1948-1985.[148] In addition, the Commission found that comparison of the overall Consumer Price Index (CPI) with the CPI sub-index for telephone services (local and long distance) showed a differential of 2.25 percent per year for the period 1935-1985.[149] The Commission computed AT&T's productivity in the post-divestiture period by evaluating AT&T's price experience as if its proposed plan had been in effect, and found a productivity differential of 2.48 percent, similar to the long term studies of the Bell System.[150] A two-factor study of AT&T's productivity in the pre-divestiture period revealed a productivity advantage of 2 percent.[151]

73. In view of the relative paucity of post-divestiture productivity data reflecting LEC productivity, various parties have attempted their own studies of post-1984 LEC productivity. The more credible of these efforts have involved indirect price analyses of LEC productivity. These studies, versions of which have been variously submitted, first by Bellcore, and then by AT&T, impute a productivity offset from inter-period price changes.[152]

74. As described in the Further Notice, Bellcore submitted its first LEC post-divestiture productivity study on March 17, 1988, prior to the adoption of that Notice.[153] The validity of this study was undercut by the fact that it was based on a price cap plan proposed by the LECs that was substantially different from that proposed by the Commission in the Further Notice.[154] To increase the usefulness of the data underlying the Bellcore

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148 Id. at 3403 (para. 372).

149 Id. at 3404 (para. 374).

150 Id. at 3404-05 (para. 377) and Appendix C. The AT&T study was updated in the Report and Order and Second Further Notice to reflect a differential of 2.3 percent. 4 FCC Rcd at 2995 (para. 234) and 3335 (Appendix C).

151 Second Further Notice, 4 FCC Rcd at 2991 (para. 226)(arguing that two-factor analyses tend to understate productivity), citing J. Kendrick, Improving Company Productivity at 87, 102 (1984).

152 The Commission itself conducted a post-divestiture study of this type relating to AT&T, and relied upon it in part in selecting a 2.5 percent productivity offset for AT&T. 4 FCC Rcd at 2995-96 (paras. 234-236).

153 Bellcore, "The Impact of Federal Price Cap Regulation on Interstate Toll Customers," Mar. 17, 1988 (March 17 Bellcore Study).

154 For example, Bellcore assumed that there would be a single basket for all interstate access services, did not adjust rates for demand

study in determining accurately LEC productivity during the post-divestiture period, the Commission requested that the Bellcore study be revised to conform to the plan proposed in the Further Notice.[155] On August 18, 1988, Bellcore submitted its second study, concluding that under the Commission's proposed price cap plan, LEC industry productivity during the post-divestiture period was substantially lower than the 2.5 percent long run estimate contained in the Further Notice.[156]

75. Bellcore's conclusion was contested strongly by non-LEC commenters, some of whom provided their own interpretations of LEC-supplied data. Interpreting these data, they advanced productivity calculations for the LECs that yielded results much higher than the Commission's 2.5 percent estimate. One of the most comprehensive critiques of the Bellcore studies was filed by AT&T.[157] According to AT&T, the Bellcore study contained a number of serious errors and estimates that when corrected, produced a productivity factor of 7.23 percent for switched access and 6.63 percent for special access.[158]

76. The Commission agreed that Bellcore's second study was flawed. The Commission noted that use of an indirect price analyses to impute the productivity offset requires that certain exogenous cost changes be netted out of price changes in order to place the set of prices used as the starting

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stimulation due to regulatory changes, and used the CPI in its study as its measure of changes in the cost of factors of production. By contrast, the Commission proposed two baskets, proposed that rates for demand stimulation due to regulatory changes be treated as an exogenous adjustment factor to the carrier common line charge, and proposed to measure inflation by the GNP-PI fixed weight price deflator. Further Notice, 3 FCC Rcd at 3293 (para. 187).

155 Id. at 3412 (para. 395).

156 Second Further Notice, 4 FCC Rcd at 3199 (para. 677) (stating that LEC industry productivity post-divestiture has been -0.07 percent for switched access, -5.27 percent for special access, and -0.43 percent for total access). See Bellcore, "The Impact of the FCC Proposed Price Cap Plan on Interstate Consumers," Aug. 18, 1988 (Supplemental Comments of Southwestern Bell Telephone)(August 18 Bellcore Study).

157 "Analysis of the Bellcore Study", AT&T Reply at Attachment C, Sept. 9, 1988.

158 See Second Further Notice, 4 FCC Rcd at 3199-3200 (paras. 678-81). An earlier-filed AT&T study had concluded that the productivity differential should be 7.1 percent (if the price cap formula included an adjustment for common line demand growth). Id. at 3196-97 (para. 672).

point and the set of prices used as the ending point on the same footing.[159] This was difficult to accomplish, the Commission recognized, because the LECs experienced so many exogenous cost changes during the 1984-1988 period due to divestiture, the implementation of access charges, and other regulatory reforms, particularly those related to separations. Indeed, the Commission stated that so many changes occurred during this period that slight differences in the methodology used to account for such changes, or small errors in the data, could lead to significantly different estimates of LEC productivity growth.[160] The Commission also speculated that the results from these productivity analyses seemed highly dependent on the choice of starting and ending dates within the 1984-1988 period. Apart from questions concerning the treatment of underlying data, this sensitivity to starting and ending dates raised serious questions in the Commission's estimation about the level of confidence that could be accorded to attempts to calculate recent LEC productivity based on post-divestiture studies.

77. At the time it issued the Second Further Notice, the Commission had amassed a great deal of information about productivity of the telecommunications industry. Long-term productivity measures consistently demonstrated a productivity differential of between 2 and 3 percent.[161] Furthermore, the data for the most part tended to show increased productivity in more recent years. Most of this long term data, however, covered the pre-1984 period. The data received on post-divestiture productivity appeared to be biased by significant methodological flaws.

2. The AT&T Study

78. In response to the Second Further Notice, AT&T submitted its most recent analysis of LEC post-divestiture productivity experience, arguing that the productivity offset the Commission has designated for the LECs is too low. In its historical analysis, AT&T found that a 7 percent productivity offset would have been necessary to produce the same switched access revenues under the proposed LEC price cap plan as was produced under rate of return.[162] In its prospective analysis, it found that a 5 to 6.4 percent productivity offset would be required to yield equivalent rate of return and price cap

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159 See id. at Appendix E, 3364-72.

160 Id. at 3211 (para. 699).

161 Studies and data revealing higher productivity tended to be measures of total productivity, not measures of the amount by which the telephone industry exceeded the national average.

162 AT&T Comments at Appendix A, 4.

revenues.[163] Finally, in its analysis of special access, a productivity offset of 4.6 percent would have been required in a special access basket to match price cap and rate of return results.[164]

79. In the portion of its study devoted to switched access, AT&T makes several errors that we tentatively find distort the results in the 1986-1989 time period that AT&T obtains. First, AT&T uses a unit of measure that distorts its quantitative conclusions about LEC productivity. Specifically, we object to AT&T's use of ratemaking minutes rather than total minutes in its analysis.[165] As BellSouth and others argue, to the extent that AT&T uses ratemaking minutes instead of total minutes, it automatically "discounts" nonpremium minutes 55 percent by attributing to LEC productivity all of the substantial shift from nonpremium to premium access that took place during the study period. This is clearly unacceptable based on the fact that the growth in premium access during that period was largely due to equal access conversions as part of a mandatory program imposed on the LECs.

80. The Commission's analysis of the second Bellcore study[166] warned against exactly this kind of error.[167] While AT&T assumes the migration to equal access increases productivity, Appendix E to the Second Further Notice explains that the relationship between premium minutes and productivity is not at all clear. Movement from non-premium to premium minutes affects both carriers' costs and the value of the service being provided, in a way that makes it difficult to assess the relationship between productivity and equal access. For example, non-premium messages may transit local switches more often than premium messages. But non-premium messages may not utilize as many switching features as premium messages. Given that the relative costs of premium and non-premium access are unclear, we find that AT&T's assumption that equal access implementation has generated long term productivity gains to be insufficiently supported. We would have preferred AT&T to treat the conversion to equal access differently, by evaluating total costs and total minutes at the beginning and end of the study period, and removing, as an exogenous cost change, equal access costs that occurred in the interim.[168]

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163 Id. at Appendix A, 7.

164 Id. at Appendix A, 15.

165 Ratemaking minutes are the sum of premium minutes and a 55 percent discount on nonpremium minutes. Section 69.105(b)(4)(ii) of the Commission's Rules.

166 Id. at Appendix E.

167 Id. at Appendix E, 3367-68.

168 We recognize that if AT&T replicated its study using total minutes

This methodology prevents any distortions in study results arising from the migration to equal access.[169]

81. AT&T's use of ratemaking minutes in effect assumes that the one-time revenue and price effects resulting from the conversion to equal access, with corresponding shifts from nonpremium to premium minutes of use, has an ongoing relationship to LEC productivity. As indicated above, when an exchange is converted to equal access, a "jump" in ratemaking minutes occurs even if total minutes are unchanged because non-premium minutes (i.e., discounted minutes) become premium minutes. However, as equal access conversion is completed -- and we agree with NYNEX's comments in the record that most of the conversion to equal access is now complete -- this source of increase in ratemaking minutes will greatly decline. A study that is based on events that will not continue produces an idiosyncratic result that should be heavily discounted in the selection of a productivity offset.

82. A second major error in AT&T's historical analysis is its choice of a 1986 start year. This error influences the historical study's view of switched access rates, as well as AT&T's view of the productivity offset required for special access. We recognize, of course, that choosing a 1986 start date avoids problems associated with using data from an earlier period in which events took place that will not, in all likelihood, be repeated. By this we mean the many changes that took place in the telecommunications industry during 1984 and 1985 as a result of divestiture and significant changes in our rules that had a profound effect on the costs of doing business. However, the effect of these changes can be evaluated and removed from the analysis in a manner that provides a more accurate picture of LEC productivity than if data from those years were omitted altogether. This is a technique common to all indirect price studies, including the ones performed by AT&T to determine LEC productivity.[170]

83. By its choice of 1986 as a start date, AT&T reduces the few available years in the post divestiture period from which it can derive estimates of the rate of change of various costs, and it reduces the

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instead of ratemaking minutes, productivity would likely decrease since the conversion to equal access would be reflected as an increase in access prices. The methodology we suggest eliminated that distributive effect completely.

169 Id. at Appendix E discussed the difficulties inherent in treating equal access costs as an exogenous cost change, difficulties arising due to the definitional issues surrounding equal access. We note that in staff study A, equal access costs were removed based on this Commission's own definition of equal access. See id. at Appendix C.

170 See id. at Appendix A, 1.

protection against random error or atypical events that would otherwise be available through analysis of a wider range of data years. We are not convinced that the data available from previous periods is so unreliable as to be completely discounted. For example, AT&T's analysis ignores six months of data for 1985 that is readily available in the 1985 Tariff Review Plan.[171]

84. The difficulty with AT&T's failure to analyze the entire post-divestiture period is the high degree of sensitivity we have discovered between the start date and the results that parties obtain in these indirect price analyses of productivity. By choosing a particular point in time, a party conducting an indirect price analysis can select the results its seeks. AT&T's own calculations demonstrate this phenomenon. In ex parte materials submitted in defense of its study, AT&T adjusts 1984 traffic sensitive revenue per minute data to obtain a 1986 view, in an effort to calculate a reasonable range of traffic sensitive growth.[172] Shifting the start dates changed the traffic sensitive growth from 2.14 percent to -3.68 percent.[173] Since these calculations appear to be highly sensitive to the period studied, we tentatively find that the selective use of time segments within the post-divestiture period, rather than the entire period, forces us to discount heavily the results obtained.

85. In addition, AT&T fails to supply complete citations to document its table of exogenous costs and appears to make exogenous adjustments that fail to reflect the actual pattern of cost changes that occurred. For example, the AT&T study appears to adjust for changes in tax costs resulting from federal tax reform in 1987, when those cost changes were not recognized until later periods.

86. The portion of AT&T's study that looks ahead to the 1990-1993 period is similarly confounded by methodological errors. One major determinant of AT&T's prospective study results, and a major focus of attention by commenters, is the absence of a linkage between its GNP-PI and revenue requirement assumptions. AT&T projects that the GNP-PI will increase at 5 percent per year, while at the same time, it projects that cost trends from the 1986-1989 period -- when inflation rates as measured by the GNP-PI were only 3.6 percent -- will not increase during 1990-1993. In AT&T's view, inflation and revenue requirements are completely unrelated. Its analysis

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171 Furthermore, additional data from 1984 had been available since the fall of 1988 as a result of an informal data request by the Common Carrier Bureau.

172 The results of its calculation were used to determine the range of reasonable traffic sensitive cost growth rates for use in its prospective look at LEC productivity.

173 AT&T Ex Parte Submission in CC Docket No. 87-313, Sept. 20, 1989.

implies that the accelerated inflation in forecasts for the 1990-1993 period will not affect the rate of growth of costs.

87. We reject this analysis as founded on unsubstantiated assumptions. AT&T's view that no relationship exists between inflation and costs runs counter to common sense and existing regulatory practice. Indeed, the price cap formula used to set aggregate price ceilings for AT&T's rates contains an explicit inflation adjustment intended to reflect changes AT&T faces in the cost of factors of production. That adjustment, common to price cap regulatory systems around the Nation and the world[174] explicitly recognizes the link between inflation and costs.

88. We tentatively find that if inflation is forecast to be appreciably higher in 1990-1993 than in 1986-1989, costs should be forecast to grow more rapidly as well through this period. AT&T could have recognized the link either by increasing the growth in revenue requirements or by using the rate of inflation that actually occurred in the 1986-1989 period.[175] To demonstrate the significance of AT&T's error, had AT&T employed the historical growth in the GNP-PI of 3.6 percent from 1986-1989 in its analysis, the "breakeven" common line productivity offset it would have obtained is approximately 3.9 percent. In failing to consider the consequences of inflation on other input variables that it uses to determine LEC productivity, AT&T undercuts the credibility of its projections and reduces its calculations to mechanical exercises that have no realistic application to estimating the productivity offset factor. By contrast, an analysis that takes into account the functional relationship of input variables could more meaningfully produce a projection of LEC productivity into the future. For example, as NERA suggests, the consequences of increasing inflation could cause non-capital costs to increase more rapidly, or cause investors to demand a higher return on capital. According to NERA, and we agree, such factors, if properly considered, would lower the calculated "breakeven" productivity offset in the prospective period. We tentatively conclude that without some consideration of these and other factors, that are directly affected by an increase in inflation, AT&T's analysis is skewed in the direction of overstating the level of the productivity factor required to produce results equivalent to rate of return regulation.

89. AT&T also uses a range of assumptions about the growth rate in unit traffic sensitive revenue requirements that appears unsubstantiated and is heavily contested in the record. This is a particular problem because this assumption, as commenters recognize, contributes heavily to the result

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174 E.g., Great Britain and California cited supra.

175 We note that AT&T projected that GNP-PI growth would increase to 5 percent, without providing documentary support for its assumption.

that prices under rate of return will be lower than under price cap regulation. The only corroboration AT&T supplies in its comments to support its -3 percent, -1.5 percent, and 0 percent growth factors, is that between 1986 and 1989, unit traffic sensitive costs have declined at an average annual rate of 3.2 percent had there not been exogenous cost changes.[176] AT&T argues that the range of traffic sensitive revenue requirement growth used in its prospective study, of between -3 and 0 percent, is therefore conservative. Our view of AT&T's support is that the historical decline in traffic sensitive revenue requirements of 3.2 percent appears to be a creature of AT&T's selection of a 1986-1989 study period, as well as its decision to use ratemaking minutes. AT&T also did not provide information as to how it chose various exogenous costs in its calculations. If we use a positive 2 percent unit traffic sensitive cost growth rate that the LEC industry argues is accurate,[177] the "breakeven" productivity offset for traffic sensitive costs becomes 2.5 percent.

90. The flaws in AT&T's methodology cause us tentatively to find that the results of its study are inaccurate. Furthermore, since the errors committed tend to overstate productivity, we tentatively find that the study does not provide evidence that our tentative selection of a 2.5 percent productivity offset is wrong.

91. We remain confident that 2.5 percent is the most reasonable estimate of the historical productivity offset. We seek to use the opportunity presented by this Notice to investigate further LEC productivity in the post-divestiture period. We therefore present two studies of LEC productivity conducted by our staff that focus on the post-divestiture time period and request comment on these studies, as well as on the 2.5 percent proposal in general. In commenting on our proposal, parties should keep in mind that the automatic stabilizer we proposed in the Second Further Notice, and that we refine in this Notice, was created in part to answer the heightened uncertainty (relative to the AT&T offset) surrounding LEC productivity.[178]

3. New Evidence

92. To further examine the issue of LEC productivity, Commission staff have conducted two separate productivity studies. One study examines LEC

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176 AT&T Comments at Appendix A, 5 n. * .

177 USTA Reply, Attachment C (NERA Report) at 6-8. See also id. at Attachment B (Ernst and Whinney Report at 5 (arguing for a 1 percent growth in unit traffic sensitive costs).

178 Second Further Notice, 4 FCC Rcd at 3212 (para. 700).

productivity in the post-divestiture period using data submitted by AT&T and USTA. The other study attempts to confirm long term estimates of local carrier productivity by examining the indirect productivity of the total telephone industry between 1928-1989 using a Consumer Price Index series.

93. The first staff study, by Frentrup and Uretsky, analyzes LEC productivity in the post-divestiture period by evaluating price changes that the LECs have experienced since divestiture.[179] Specifically, the study presents two analyses of interstate access charges to determine the productivity offset under the price cap proposal that would be necessary to yield results equivalent to those under rate of return. The study is based on information submitted by USTA and AT&T pursuant to a data request issued by this Commission on January 26, 1990. In that request, the Bureau requested data on local exchange carrier revenues, revenue requirements, exogenous costs, and demand for the period 1984-1989. It further requested that to the maximum extent possible, all data should come from LEC Tariff Review Plans and Forms 492 and that, if additional sources were needed, they be publicly available.

94. To account for the many "one-time" changes that took place in the post-divestiture period, which would have been reflected in a price cap plan had it been in effect at that time, the study adjusts common line and traffic sensitive revenues for exogenous cost changes and common line and traffic sensitive demand for demand stimulation created by those changes to determine common line and traffic sensitive prices.[180] Common line price growth rates and traffic sensitive price growth rates are calculated for the two periods, June 1984 to December 1989 and June 1985 to December 1989. Because growth rates for these two periods are substantially different, the study also computes a growth rate using a regression formula that essentially averages the 1984-1989 and 1985-1989 growth rates. For each of these growth rates, the study calculates the productivity offset needed to match rate of return results for switched access. A separate calculation is performed for USTA and AT&T data.

95. The results of this study, based on the separate analyses of USTA and AT&T data, show that the required productivity offset for interstate switched access is approximately 4 percent. Specifically, analysis of the USTA data indicates that a productivity offset of 3.80 percent is required to yield

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179 This study is presented in Appendix C to this Notice.

180 Although data was submitted for special access revenues, exogenous changes, and demand, this data was not useful. The special access demand data submitted was for a subset of total special access demand which accounted for about 75 percent of total special access revenues in 1984 to 1985, but only about 50 percent of revenues in 1989.

the aggregate switched access prices that occurred under rate of return, while analysis of AT&T's data indicates that the required productivity offset for switched access is 3.98 percent. The accompanying charts further show the sensitivity of growth rates to the selection of a start date in the post-divestiture period. For example, the study shows very different adjusted common line rates for the periods 1984 -1989 and 1985 -1989, with a far greater growth in common line rates appearing in the 1985 -1989 period when 1984 data is omitted. The results of the study also reveal that the selection of price cap index formulas for capping common line substantially impact the determination of growth rates.

96. We seek comment on the results of this study and the methodological approach used to derive them. In particular, we seek comment on the validity of a post-divestiture study that uses only five data points (rates per minute for each of five years), particularly where the data points reveal substantial deviation from the average trend. We also seek comment on how to rationalize these results with our current productivity record.

97. The second productivity study, by Spavins and Lande, attempts to confirm the results of estimates of local carrier productivity that rely upon detailed examination of the change in the price of interstate access during the post-divestiture period.[181] To explore the validity of the assumption that past trends are continuing in the future, the study examines the indirect productivity of the telephone industry by observing the price performance of the total telephone industry between 1928-1989.

98. The conclusions of the second staff study are presented in a series of charts. Chart 1 shows that the productivity of the telephone industry exceeded that of the average industry by about 1.7 percent a year. However, as the study points out, productivity changes over 1928-1989 were not constant. The study identifies the rate of inflation as a factor in producing these changes. Chart 2 shows the connection between the rate-of-inflation and the change in carrier price performance relative to the long term trend. In general, according to the study, high or rising inflation is associated with relative prices that fall faster than average.

99. To explain the change in the gap between measured productivity and the rate of inflation, the second staff study estimates a regression equation and then plots the difference between the actual real price of telephone service and the predictions of the regression equation. The results are shown as a random trend in Chart 3. This trend, according to the study, demonstrates that changes in productivity are due to changes inflation that tend to cause an increase in the costs of the telephone service and are not due to the structure of technological progress. The study concludes that these

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181 The study is presented in Appendix D to this Notice.

trends are not surprising since the telephone industry is very capital intensive with a preponderance of its revenue requirements driven by the costs of telephone plant that are sensitive to inflation. The study also demonstrates that productivity trends show no change in 1984 or the post-divestiture period.

100. We seek comment on whether parties agree with the second staff study that there has been no dramatic "break-point" in productivity trends for the telephone industry over the study period and whether there are reasons to believe that forces underway will increase productivity above these long term trends. We are also interested to know if there are reasons to believe that interstate access productivity is and will remain different from the productivity experience for local access or intrastate toll activities and whether the greater relative growth in interstate usage explains the difference in measured productivity between jurisdictions. We are interested to know whether it is reasonable to expect that the increase in productivity generated by price caps will cause a long term increase in carrier productivity, and if so, by how much. We also seek comment on how to rationalize the results of the two studies with each other, and with the productivity record we have amassed in this proceeding thus far.

4. Independent LEC Productivity

101. Throughout the course of this proceeding, independent telephone companies have consistently sought a productivity offset smaller than the 2.5 productivity factor proposed for use in the price cap index. Independent LECs, who are for the most part smaller in size than the BOCs, argue that they have fewer opportunities than larger companies to achieve cost savings and efficiencies. We do not fundamentally disagree with the principle articulated by the independent LECs. Indeed, the Commission has previously made policy decisions in accordance with this principle.[182] Unfortunately, as the Commission has stated in previous orders in this docket, the problem with attempting to craft a separate productivity offset for the independents has been that there is so little in the current record to provide specific guidance as to how to calculate a separate productivity factor for them.[183] The Commission did, however, provide that participation in price cap regulation would be optional for eligible independent telephone companies below the Tier 1 level. This tentative decision is an indication of the

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182 See, e.g., MTS and WATS Market Structure, Recommended Decision and Order of the Federal-State Joint Board, 2 FCC Rcd 2324, adopted, 2 FCC Rcd 2953 (1987)(small telephone companies may have fewer opportunities than larger companies to achieve cost savings and efficiencies and thus are eligible for high cost assistance funding).

183 See Second Further Notice, 4 FCC Rcd at 3210 (para. 698).

Commission's concern that its productivity factor might prove unduly burdensome to this segment of the industry.

102. With regard to setting a productivity offset for smaller independents, the Commission noted in the Second Further Notice, that one quantitative analysis submitted by the LECs seemed to suggest that a 1 percent differential might exist between BOC productivity and the productivity of the remainder of the industry.[184] However, since the Commission recognized that the non-BOC portion of the industry did not consist entirely of small telephone companies, it declined to attribute the 1 percent differential to small companies alone.[185]

103. There are other suggestions in the record that independent LEC productivity might be lower than BOC productivity. When NERA investigated productivity, for USTA, it found that productivity grew as a function of growth in lines and toll usage.[186] Since independents generally have less total toll usage than the BOCs, NERA/USTA imply that the productivity of independents is lower. In a study of productivity for the 1984-1987 period, NERA found that non-Bell companies had higher average costs than Bell Companies.[187] A second consultant for USTA performed cost regressions for telephone companies over a four year period from 1984-1987 and determined that the level (as distinguished from rate) of productivity of non-BOCs was lower than that of the BOCs.[188] These studies also appear to be consistent with the findings of Christensen that a 1 percent differential exists between the productivity of the BOCs and non-BOCs.[189]

104. In the current round of pleadings, CBT and PRTC provide studies that attempt to resolve the issue, albeit on an individual case basis. Specifically, these studies purport to show that the individual company

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184 Id.

185 Id. Furthermore, since the analysis was based on the second Bellcore study, which the Commission found contained numerous methodological flaws, it would appear that the analysis of the independent company differential is tainted by problems with the second Bellcore analysis.

186 USTA Reply, Attachment C (Table 3).

187 Id. at 30 (Table 4).

188 Id. L.J. Perl and J. Falk, ("The Use of Econometric Analysis in Estimating Marginal Cost", Table 1 (Apr. 6, 1989)).

189 See Testimony of L. Christensen filed in United States v. AT&T, Civ. Action No. 74-1698 (D.C.C. filed Nov. 20, 1984).

productivity of CBT and PRTC is less than the productivity factor proposed by the Commission. While we do not pass judgment on the results of these studies, CBT's analyses, both pre-divestiture and post-divestiture, are of particular interest to us because of their methodological approach that takes into account historical data. We believe that a study that is grounded in long term historical data provides a more reliable assessment of productivity than one that is derived in a purely theoretical context. We note that CBT concludes that its productivity has grown much less rapidly than that of the BOCs, and on this basis, argues for a productivity offset for non-BOCs of 1.5 percent.

105. While CBT's efforts have resulted in our obtaining more information that tends on its face to support a different offset, the productivity experience of a single Tier 1 independent cannot form the basis of a policy judgment affecting an entire segment of the industry. Although we cannot reliably select a productivity factor applicable to all independents based on CBT's study, we encourage other independents, concerned about the applicability of the proposed offset to their operations, to submit data, studies, and analysis similar in format to that of CBT.[190] Such submissions would provide us with a fuller record upon which to judge the advisability of making an adjustment to the productivity offset for the independents or some subset of independents.

5. General Productivity Issues

106. With regard to arguments that the proposed productivity offset is generally too high or low, the Commission's tentative selection of a 2.5 percent productivity offset was not a hastily made decision or a decision that was made without documented support. Indeed, as the record exhaustively details, the Commission carefully considered various means of measuring productivity and only after examining them closely, with full participation from interested parties, was the proposed offset selected from available evidence. While no measurement is infallible, we tentatively conclude that

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190 In particular, we are interested in seeing which input factors are considered during any relevant study period. We would also find it useful for companies to separate their analyses between the post-divestiture and pre-divestiture period. In inviting additional comment on the productivity differential LECs have experienced in the long term and since divestiture, we have not explicitly sought comments on the formula proposed in the Second Further Notice for capping common line rates. In commenting on the productivity differential we should select for use in the formula or formulas we should adopt, parties are of course free to advocate their views on the structure of the price cap formula that applies to the common line basket, and whether the selection of a particular kind of formula compels a particular offset.

the 2.5 percent offset accurately reflects the available evidence of LEC productivity.[191] With the release of the two staff studies of productivity in this Supplemental Notice, however, we continue to pursue additional evidence that will assist us in assessing our tentative judgment.

107. Moreover, we do not agree with parties that contend that the Commission has overlooked significant potential productivity gains that will be realized through technological innovation in selecting its productivity factor. As a preliminary matter, while we agree that new telecommunications and data processing technologies will likely increase network efficiency and reduce the cost of providing telephone service, the impact of these advances on productivity has not been quantified by parties that make this argument. This aside, no data have been presented that refute the well established fact that the communications industry, since its inception, has been marked by technological innovation. This being the case, our productivity factor, based on the long-run historical experience of the industry, already reflects this characteristic.

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191 Several states have adopted productivity offsets in conjunction with incentive based regulatory plans. We note that California, for example, has adopted regulation centered around a price cap indexing mechanism that is adjusted annually according to the GNP-PI inflation index reduced by a productivity adjustment of 4.5 percent. See generally Before the Public Utilities Commission of the State of California, In the Matter of Alternative Regulatory Frameworks for Local Exchange Carriers (Decision 89-10-031), Interim Opinion (Oct. 12, 1989). We do not believe that the designation of a 4.5 percent productivity offset factor for intrastate services in California should bear significantly on our selection of a productivity offset to be used in a federal price cap plan for interstate access since the plans differ in significant respects. Just as the productivity of one operating company cannot be assumed to apply to an entire segment of the telecommunications industry, the productivity offset for California cannot be assumed to apply to the Nation as a whole.

III. AUTOMATIC STABILIZER

A. Summary of Tentative Findings

108. In the Second Further Notice, the Commission stated that although it believed the 2.5 percent estimate of the amount by which LEC productivity exceeds the productivity performance of the general economy was reasonable, it recognized there was less corroboration for the 2.5 percent estimate from post-divestiture data than there was for AT&T's productivity offset.[192] The lesser degree of corroboration was aggravated, it said, by the possibility of statistical variation in productivity among different LECs. The Commission voiced its tentative concern that some carriers therefore could consistently under-perform or over-perform through time relative to the industry benchmark for productivity.[193] In addition, the Commission noted that there was no meaningful competition in LEC markets serving as a regulatory backstop to counter these uncertainties. Accordingly, it proposed a device it called an "automatic stabilizer" as an alternative backstop to ensure that the LECs' prices and profits would remain within a zone of reasonableness relative to costs, while maintaining efficiency incentives for these LECs.[194]

109. The automatic stabilizer proposed in the Second Further Notice would function as a once a year adjustment to a carrier's price cap index levels. If a carrier's earnings for the past rate period were within the stabilizer range, no adjustment would be made to the price cap levels. If its earnings were above or below the range, its price cap index would be adjusted for future application to the level that would have produced earnings at the top or bottom of the range, respectively. The adjustment would not drive the index to the rate of return mid-point. Retargeting, if necessary, would occur at each annual revision of LEC access tariffs, for the duration of the initial four-year period of price caps. The stabilizer mechanism of the Second Further Notice would not require refund or recoupment of profits or losses from earnings beyond the range in the immediately preceding rate year.

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192 Second Further Notice, 4 FCC Rcd at 3212 (para. 701).

193 Id. at 3212-13 (paras. 702-703). To elucidate the effect on carrier earnings of abnormally low or high productivity factors in the price cap formula, the Commission sought to quantify the approximate relationship between changes in productivity and rate of return. The Commission's initial analysis indicated that, under price caps, an average LEC would have to lower its costs by 5.5 percent per year relative to inflation (more than twice the long term historical cost reduction) to increase its rate of return by 1 percent. Id., 4 FCC Rcd at 3213-14 (paras. 705-706).

194 Id. at 3212-13 (paras. 702-703).

However, since the price cap index levels, when adjusted by the stabilizer, would limit a carrier's actual price index levels, the stabilizer was designed to return rates to reasonable levels on a prospective basis.[195]

110. The Commission tentatively found that the stabilizer range should consist of a two percentage point range above and below the current rate of return prescription.[196] It explained that the 2 percent spread on either side of the target overall return for rate of return carriers represented the range of required returns of comparable firms in the competitive private sector, as determined in its previous rate of return prescription proceeding in Docket 84-800.[197] The Commission also tentatively found that the stabilizer range would shift in accordance with the periodic Part 65 represcription process. The target rate of return for rate of return carriers would continue to serve as the midpoint of the 4 percent-wide stabilizer zone, even if the target return changed.[198]

111. The Commission tentatively concluded that, during the initial four years of the new price cap regime, erring in the direction of safeguards for ratepayers and shareholders in the form of the automatic stabilizer would be the most prudent course. It also suggested, however, that as it gains experience over this period with price cap regulation, particularly with respect to a reasonable estimation of LEC productivity, it could eventually

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195 Id. at 3215-16 (paras. 707-708). The Commission described the stabilizer mechanism as a way for consumers to "share" in some of the benefits of performance beyond the top of the range since earnings above the stabilizer range would result in a rate decrease at the next annual filing. In return, the Commission tentatively found that ratepayers should bear some of the risks of performance below the bottom of the range by increasing rates if earnings drop below the range. To be precise, this "sharing" by means of prospective index adjustments is to be distinguished from: (1) "sharing" by means of partial retrospective refunds to ratepayers of earnings in excess of a given rate of return ceiling; and (2) "sharing" by means of the Consumer Productivity Dividend proposed in the Second Further Notice.

196 Id. at 3215 (para. 707).

197 In that proceeding, the Commission reviewed required rates of return of 47 comparable firms, based on a variety of criteria; the data collected in that process showed that a 2 percent range on both sides of the rate of return mid-point would encompass 73 percent of these firms. See Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, Memorandum Opinion and Order, CC Docket No. 84-800, Phase III, FCC No. 86-354, released Aug. 25, 1986.

198 4 FCC Rcd at 3218 (para. 714).

remove the stabilizer.[199] In addition, the Commission stated that it did not believe the stabilizer would eliminate price cap incentives for efficiency, although it recognized the mechanism would dampen these incentives at a certain level of achieved productivity.[200]

112. As an alternative to the automatic stabilizer, the Commission proposed to conduct its comprehensive performance review of price caps during the third year of the plan rather than during the fourth year. It stated that an early review could provide the same opportunity as the stabilizer to assess and adjust price caps, possibly with less negative effect on LEC incentives for efficiency than any negative effect caused by the stabilizer.[201]

113. In addition to the foregoing tentative conclusions and proposals, the Commission sought comment on any alternative proposals the parties might wish to make, including specification of how these proposals would strike a better balance between LEC incentives for efficiency and ratepayer protection. In particular, it sought comment on whether there should also be a refund mechanism and on how such a refund would be consistent with the recent decision of the United States Circuit Court of Appeals for the District of Columbia in American Tel. & Tel. v. F.C.C., 836 F.2d 1386 (D.C. Cir. 1988) (AT&T v. FCC).[202]

B. Pleadings

114. LECs generally oppose the automatic stabilizer on the grounds that it reintroduces the disincentives of rate of return regulation and that it is unnecessary in light of other safeguards. They conclude that it should be abandoned in favor of a pure price caps plan or that it should be modified in various ways. Many other commenters agree that the stabilizer creates disincentives, including new Averch-Johnson distortions not mentioned by the LECs. Most of these commenters also fear that the stabilizer will actually facilitate LEC overearnings. For these reasons, nearly all of the large users and approximately half of the state commissions and consumer groups that filed comments in this proceeding conclude that the stabilizer, and in some cases the price caps plan itself, should be rejected. Both supporters and opponents of the stabilizer recommend various modifications concerning the derivation, structure, and magnitude of the stabilizer's range, the duration of its

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199 Id. at 3216 (para. 709).

200 Id. at 3216 (para. 710).

201 Id. at 3216-17 (para. 711).

202 In that case, the Court invalidated the Commission's Docket 84-800 automatic refund mechanism as codified in Part 65 of the Commission's Rules.

effectiveness, and the prospective nature of its adjustments. In addition, many of the non-LEC parties recommend that the LEC overearnings allegedly made possible by the stabilizer's prospective nature instead be shared with ratepayers in the form of retrospective refunds. Finally, the great majority of commenters of all kinds condemn the Commission's alternative proposal of an early performance review as too short for generating useful data or added gains in productivity.

1. Overall Effect on LEC Incentives and Rate of Return

115. Almost all LECs argue that the automatic stabilizer ultimately frustrates the purposes of incentive regulation by perpetuating the flawed incentives of rate of return regulation which the LEC price cap proposal was designed to eliminate. In particular, they assert that a LEC which has raised its rate of return to the 2 percent upper limit of the stabilizer through cost savings from enhanced efficiency and innovation will have no incentive for further cost savings because the resulting higher earnings would simply trigger a downward adjustment to the price cap.[203] Only a few LECs express qualified support for the stabilizer, but their support is conditioned on the mechanism serving as an interim, transitional device.[204]

116. LECs raise numerous arguments in support of their view that the stabilizer would introduce incorrect incentives into the price cap regime. SWB states that the stabilizer is a variation of traditional rate base regulation which directly and artificially ties the LECs' ability to generate earnings to their expense and investment decisions. SWB claims that this reintroduces all the distorted disincentives which were so well documented in the Second Further Notice, although SWB concedes that these "disincentives would be moderated somewhat" by the 200 basis point ceiling of the stabilizer.[205] SNET argues that the automatic stabilizer "become[s] a

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203 Ameritech Comments at 15-16; Bell Atlantic Comments at 7-8; BellSouth Comments at 11-12; NYNEX Reply at 25-26; Pactel Comments at 37-39; SWB Comments at 13-15; US West Comments at 8-9; Alltel Comments at 36-38; Centel Comments at 7-8; Contel Comments at 12-13; CBT Comments at 10-11; GTOC Comments at 13-14; Rochester Comments at 17-19; SNET Comments at 16; United Comments at 2; USTA Comments at 27-28. US West also claims that the weakened incentives from the stabilizer could diminish the value of the data from the first four-year period. US West Comments at 8. See also Illinois Reply at 12. Many of the commenters from all sides either explicitly or implicitly discuss the effect of the stabilizer in terms of the current LEC rate of return prescription of 12 percent, with the stabilizer range between 14 percent and 10 percent.

204 See, e.g., Ameritech Comments at 20; BellSouth Comments at 15.

205 SWB Comments at 13-15. Several LECs argue that the Second Further

disguised form of rate of return regulation," reflecting "a policy at war with itself."[206] Alltel asserts that the economic message of the stabilizer is that if price cap regulation works too well, a carrier would not be able to realize the intended results of its increased efficiencies.[207] Similarly, Centel argues that the stabilizer would send the message to LECs and investors that earnings would be severely limited even for an extraordinarily efficient LEC charging low rates. In addition, Centel argues that annual corrections to price cap index levels could discourage carriers from taking efficiency enhancing steps which cost more in some years than others.[208]

117. Ameritech claims that the stabilizer cannot be justified by post-divestiture productivity differences among LECs because real differences can naturally be expected and the stabilizer would in effect penalize the most efficient LECs while rewarding the least efficient.[209] Some LECs also contend that the stabilizer would prolong the administrative burdens of rate of return regulation.[210]

118. Many LECs maintain that the upper limit of the automatic stabilizer is unnecessary because the LEC price cap proposal already contains numerous other new and existing safeguards against excess earnings and pricing abuses, including the productivity offset, the Consumer Productivity Dividend, the basket and band limitations, the carrier common line demand stimulation adjustment, exogenous cost adjustments, the quadrennial performance review, the complaint process, and growing competition.[211] Several LECs emphasize that the combined 3 percent offset for historical productivity and the Consumer Productivity Dividend is itself a formidable threshold and that an additional

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Notice itself acknowledged that the stabilizer would tend to dampen incentives to efficiency at certain levels of achieved productivity. See, e.g., Ameritech Comments at 16; Pactel Comments at 37; US West Comments at 8 (citing Second Further Notice, 4 FCC Rcd at 3216 (para. 710)).

206 SNET Comments at 16-17.

207 Alltel Comments at 38.

208 Centel Comments at 7.

209 Ameritech Comments at 15.

210 See, e.g., Centel Comments at 7; NYNEX Comments at 25-26.

211 Bell Atlantic Comments at 9; BellSouth Comments at 11-12; NYNEX Comments at 14-15; Pactel Comments at 37-38; SWB Comments at 15-17; US West Comments at 8-9; Contel Comments at 13-14; GTOC Comments at 11-13; Rochester Comments at 16-17; SNET Comments at 15; USTA Comments at 26-28.

5 percent growth in annual productivity would be required even to reach the stabilizer ceiling.[212]

119. Some LECs further argue that relatively high rates of return per se are immaterial under price caps. Contel states that so long as subscribers benefit from prices lower than prices would have been under rate of return, carrier earnings would be largely immaterial.[213] Bell Atlantic asserts that even if a large number of LECs were to earn high returns, the implication would be, not that price cap regulation was failing, but only that those LECs had become particularly efficient and that, at most, a higher productivity factor should be adopted at the next quadrennial performance review.[214] Similarly, Pactel claims that the notion that there must be a stabilizer to prevent excess earnings under price caps assumes that the Commission is required to prohibit earnings in excess of a specific, cost-based rate of return. Pactel argues that the Commission has already rejected that assumption in this proceeding.[215]

120. In contrast, several LECs argue that the lower earnings limit of the automatic stabilizer is quite necessary and should even trigger adjustments beyond those that the Commission proposed. They state that many independent companies for whom price caps are mandatory will have difficulty meeting the 3 percent productivity target and will therefore experience long term declining earnings and possible confiscation. This situation is aggravated, they say, by the lag in annual stabilizer adjustments and the onerous requirements for above-cap filings.[216]

121. Many other commenters, including interexchange carriers, regulatory agencies, and large users, agree with the LECs that the automatic stabilizer blunts the incentives to efficiency and innovation which price caps are intended to create.[217] These commenters charge that, contrary to our

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212 See, e.g., BellSouth Comments at 34-35; GTOC Comments at 11-13; Pactel Comments at 37-38.

213 Contel Comments at 12.

214 Bell Atlantic Comments at 9-10. See also PRTC Reply at 54. Cf. Executive Agencies Reply at 2-4.

215 Pactel Reply at 33-34.

216 See BellSouth Comments at 16-17; US West Comments at 11-13; GTOC Comments at 11; CBT Comments, NERA Study at 13-14; Lincoln Comments at 7-8; Rochester Comments at 18.

217 MCI Comments at 28-32; Justice Reply at 20-21; DC PSC Comments at 4-5; Illinois Reply at 11-12; Iowa Comments at 8-9; Ohio PUC Comments at 3-4; Ad

stated intention, the stabilizer simply resurrects rate of return regulation in a new form, with nearly all the consequent disincentives discussed in this proceeding. For example, Ad Hoc's and ICA's ETI Report describes the stabilizer as equivalent to "a banded rate of return prescription" with prospective enforcement, which grants the LECs enormous pricing flexibility without any real review of underlying cost changes.[218]

122. Similarly, MCI states that the stabilizer will create virtually the same incentives as rate of return regulation, controlling profits through control on prices. Moreover, MCI claims, this vindicates its prediction in earlier rounds of this proceeding that political considerations will preclude price cap regulation from breaking the tie between profits and costs.[219] Finally, MCI characterizes the LEC price cap plan, in conjunction with the stabilizer, as little more than rate of return regulation with regulatory lag.[220]

123. NCTA's Besen Statement also describes the stabilizer as rate of return regulation with regulatory lag.[221] According to Besen, the plan uses two sets of regulatory constraints depending upon whether the carrier is in or out of the stabilizer range: while within the range, price cap incentives operate and the carrier is permitted to keep the economic benefit of greater efficiency indefinitely; above the range, however, rate of return incentives operate and the carrier is permitted to keep such benefits only until the next rate review -- just as in rate of return regulation with regulatory lag.[222] Moreover, NCTA argues, the mechanism enables and even encourages carriers to earn well in excess of the fair return on capital as heretofore defined.[223]

124. Various interexchange carriers, state commissions, large users, and consumers find that the stabilizer creates an Averch-Johnson

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Hoc Comments at 10, Ad Hoc's ETI Report at 5-10; API Reply at 3; NCTA Reply at 13-15 and Besen Statement at 12-14. But see, e.g., Executive Agencies Reply at 3 and Alabama PSC Reply at 5, both finding that the 2 percent upper limit is adequate for encouraging significantly increased productivity.

218 Ad Hoc Comments and ICA Comments, ETI Report at 6-8.

219 MCI Comments at 29-30.

220 Id. at 33-34.

221 NCTA Reply, Besen Statement at 12-15.

222 Id.

223 NCTA Reply at 15.

effect[224] and related incentive distortions. They contend that if a LEC were approaching the upper limit of the stabilizer, it would be motivated to increase its short term expenses and capital investments in potentially inefficient ways in order to expand its rate base and allowable earnings.[225] For example, MCI argues that the LECs will have an enormous incentive to add unnecessary improvements to their networks to expand their rate bases, particularly because a 14 percent return is so much more than the cost of capital.[226] Ad Hoc and the ETI Report claim that, contrary to general belief, the conditions which support the Averch-Johnson effect in fact may not have been present during the past 25 years but that the stabilizer would now introduce a new one because of the constraint at the upper limit of the zone.[227]

125. Some parties argue that if a carrier were approaching the lower limit, it would be motivated to increase its expenses and rate base in order to trigger an upward adjustment of the stabilizer and reap additional earnings on the expanded rate base.[228] For example, the ETI Report contends that if a carrier were realizing a return below the cost of capital but above the bottom of the stabilizer range, it would accelerate expenses or advance plant construction expenditures in order to fall below the bottom of the range and enjoy an upward price cap index adjustment. ETI further claims that this inefficient response would be encouraged simply by the structure of the Commission's price cap plan and that the limited scrutiny of costs under that

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224 According to the Averch-Johnson theory, a carrier under rate of return regulation will have an incentive to inefficient, capital intensive approaches to business operations when the allowed rate of return is greater than the cost of capital, because expansion of its rate base can produce higher net earnings without exceeding the rate of return constraint. See generally Further Notice at 3 FCC Rcd 3219-24 (paras. 39-50).

225 MCI Comments at 50-54; Ad Hoc Comments at 10-11; Ad Hoc Comments and ICA Comments, ETI Report at 24-28; Iowa Comments at 8-9; Michigan Reply at 6-9; Ohio PUC Reply at 5-6; Colorado OCC Reply at 3-4; Justice Reply at 20-21 (also stating that there will be an incentive at the upper limit to cross-subsidize). See also Bell Atlantic Comments at 9 n.24.

226 MCI Comments at 52-53.

227 Ad Hoc Comments at 10-11; Ad Hoc Comments and ICA Comments, ETI Report at 24-27. The Report also argues that the carrier would have incentives to seek waiver of the stabilizer and to identify new exogenous costs. Id. at 27-28.

228 Ad Hoc Comments, ETI Report at 28-29; Iowa Comments at 9; Justice Reply at 21; Colorado OCC Reply at 3-4.

plan would make this course all the more attractive.[229] Colorado OCC argues that the bottom of the stabilizer could cause what it describes as "negative bounce" because a rate of return which is below the bottom in an early year will have its index raised higher than it otherwise would have been in later years.[230] The LECs offer almost no reply to these arguments, except Pactel, which responds that no one has explained why a LEC would deliberately incur unnecessary expenses in an attempt to depress its earned return below the floor, irrationally penalizing its own current shareholders.[231]

126. A number of commenters stress that safeguards against excess returns and earnings are essential and vitally relevant, especially in the absence of competition and reliable historical productivity data.[232] A few of them are generally satisfied with the current stabilizer proposal of 200 basis points around the 12 percent allowable rate of return, with some minor reservations and modifications.[233] Many others, however, express fear that the proposed stabilizer will not only fail to stem unduly high rates, but will in effect lock in such rates by permitting the de facto allowable rate of return to rise and hover just under 14 percent, with a consequent return on equity of 17 percent or more.[234] Maryland PC argues that "the proposed mechanism is more likely to function as [a] ratchet than a stabilizer."[235]

127. Ad Hoc's and ICA's ETI Report criticizes the Commission for basing the 2 percent magnitude of the stabilizer range on its comparable firms

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229 Ad Hoc Comments and ICA Comments, ETI Report at 28-29.

230 Colorado OCC Reply at 5-6.

231 Pactel Reply at 34.

232 See, e.g., Alabama PSC Comments at 5; NARUC Reply at 9-10; Colorado OCC Reply at 4-5; Indiana UCC Comments at 36.

233 Alabama PSC Comments at 5 (stating that the level of the proposed stabilizer may or may not be appropriate for all the LECs involved but that the range is adequate for all of them); Michigan PSC Staff Comments at 5 (stating that perhaps a significantly lower level for the stabilizer should be utilized); Executive Agencies Comments at 10; Executive Agencies Reply at 3-5 (with no major reservations).

234 See, e.g., MCI Comments at 44-46; NY Clearinghouse Comments at 9; Colorado OCC Reply at 4-5; CFA Reply at 3; Florida Citizens Comments at 2-4; Indiana UCC Comments at 36-37; Maryland PC Comments at 6-7; Ohio Counsel Reply at 2-3.

235 Maryland PC Comments at 6.

analysis in the Docket 84-800 proceeding, because the Docket 84-800 proceeding focused on setting a specific point, not a band.[236] Furthermore, the ETI Report states, the Commission itself has since criticized that comparable firms analysis in its on-going proceeding to revise Part 65.[237] The ETI Report also claims that the current stabilizer proposal would enable Tier 1 LECs to earn up to an additional $1.7 billion per year. Furthermore, it states, there would be no assurance that this would be caused by increased efficiency and innovation, rather than by understatement of historical productivity, by "strategic pricing," or by inflated exogenous costs.[238]

128. AT&T calculates LECs will earn $1.1 billion per year more than under rate of return, if the proposed stabilizer is adopted.[239] MCI states that this unearned shift in wealth to the LECs effectively upsets the balance achieved by the Commission's imposition of subscriber line charges on long distance customers over the last five years.[240] MCI also claims that a 12 percent mid-point per se is excessive because interest rates have fallen and because the LECs are relatively risk-free in comparison with competitive firms in the free marketplace.[241]

129. A few non-LEC commenters oppose operation of the stabilizer at the lower limit of the range as being too generous. For example, Indiana UCC describes the stabilizer as "a golden safety net" which guarantees LECs a

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236 Ad Hoc Comments and ICA Comments, ETI Report at 5.

237 Id. at 5-6 (citing Refinement of Procedures and Methodologies for Represcribing Interstate Rates of Return for AT&T and Local Exchange Carriers, 2 FCC Rcd 6491 (1987)).

238 Id. at 8-10.

239 AT&T Comments at 22-24.

240 MCI Reply at 15-17. PRTC and SWB reply, inter alia, that these excess earnings arguments assume without justification that a LEC could immediately raise all its rates uniformly to the upper limit, in spite of the price cap index, service band index, and market constraints, that it could likewise raise its productivity at will by 8 percent, and that any increased earnings achieved under the price cap plan would be sustained through rate increases rather than cost cutting. PRTC Reply at 52-53; SWB Comments at 15-18; SWB Reply at 28-30. See also NYNEX Comments at 22-24.

241 MCI Comments at 44-46. Ameritech replies to MCI that interest rates have in fact risen since the prescription of 12 percent in 1986, and that competitive firms with similar risk characteristics earn equity returns within the range of a 12 percent cost of capital. Ameritech Reply at 21-22.

minimum return no matter how inefficient they are.[242] Ohio Counsel contends that the LECs have ample means to protect themselves by above-cap filings and other avenues.[243]

2. Modifications and Alternatives

130. Several LECs propose changes to the current stabilizer proposal to divorce it more completely from the rate of return concepts which they perceive as defining the mid-point proposed in the Second Further Notice. US West argues that determination of the stabilizer range in this proceeding should not be construed as a prescription or a precise engrafting of a rate of return principle onto incentive regulation, because the stabilizer should be a temporary measure rather than an integral part of price caps.[244] A number of LECs urge that the end-points of the range should be fixed for the first four-year cycle of price caps, rather than floating with the outstanding rate of return prescription, in order to avoid instability and distorted incentives for efficiency and innovation.[245]

131. Several LECs propose that this Commission determine the stabilizer range based on the statistical distribution of earned returns by a sample of nonregulated firms of comparable size and risk.[246] The proposal ranks the earned returns on equity of stocks in the Standard & Poors Industrials index, selects the spread from the middle two quartiles (i.e., middle 50 percent) and converts it into a rate of return range based on the

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242 Indiana UCC Comments at 33-35.

243 Ohio Counsel Comments at 4.

244 US West Comments at 10-11.

245 Bell Atlantic Comments at 11 n.29; BellSouth Comments at 12 n.25; Pactel Comments at 41-42 (advising that the stabilizer range should be changed only if the new prescription fell outside of the range); US West Comments at 11-13. But see Colorado OCC Reply at 4 (stating that this Commission should frequently represcribe the rate of return mid-point of the stabilizer to retain its relevance to current market conditions).

246 See USTA Comments at 28-30; BellSouth Comments at 12-14 and Appendix; Bell Atlantic Reply at 19-21; SWB Comments at 17-22; CBT Comments at 10-11; Rochester Comments at 18; SNET Comments at 17.

average capital structure of the BOCs.[247] The LECs show that application of this method to actual data produces a range of 10.4 to 16.5 percent.

132. NYNEX urges its own comparable earnings approach, adding a spreading zone of reasonable earnings to progressively broaden the incentives at both the upper and lower ends of the stabilizer range. It derives this zone by using the middle 50 percent of returns for the first two years of price caps and the middle 75 percent for the second two years, yielding ranges of 10 to 14 percent and 8 to 16 percent, respectively.[248] Ameritech also uses market to book ratios of comparable nonregulated firms to show that the Commission's 400 basis point range is reasonable.[249]

133. Proponents of the comparable earnings approach argue that it simulates the competitive environment, extends the Commission's own past practice, and uses readily available data. In addition, they contend that it eliminates aberrations arising from single-year variability and from firms with returns at the high and low extremes of the range.[250] Ad Hoc replies, however, that these commenters ignore the significantly higher volatility, and therefore higher investor-required return, of the so-called comparable nonregulated firms.[251]

134. Several commenters other than the LECs express concerns about the derivation of the stabilizer range, as well as related issues. Maryland PC states that the rate of return mid-point is subject to uncertainty due to

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247 For example, in BellSouth's version, the range of earned returns on equity of the middle 50 percent of the sample universe was factored into the BOCs' average capital structure as of December 31, 1988, i.e., approximately 60 percent equity and 40 percent debt with an average embedded cost of debt of 8.7 percent, to yield a corresponding range of rate of return. Some LECs recommend using the average return on equity over periods of more than one year to control for short term aberrations. See Bell Atlantic Comments at 43; BellSouth Comments at 14; SWB Comments at 19.

248 NYNEX Comments at 18-19 and Appendix C.

249 Ameritech Reply at 25-27.

250 See, e.g., BellSouth Comments at 14.

251 Ad Hoc Reply at 27-28. See also NY Clearinghouse Reply at 8-10.

a pending rulemaking to revise interstate rate of return methodology.[252] Maryland PC also states that after price cap regulation becomes mandatory for Tier 1 LECs, the rate of return prescription will be developed mostly for smaller firms that have less financial resilience and greater need for generous rates of return, creating an upward bias.[253] New York DPS and Florida Citizens argue that the 200 basis point limits should be defined in terms of return on equity rather than total cost of capital to preclude unjustified returns on equity of more than 17 percent, which they claim would be possible under the current proposal.[254]

135. Several commenters criticize the width of the earnings range proposed in the Second Further Notice. Some of them make specific recommendations to move the upper limit of the range closer to the mid-point.[255] Some of them also recommend raising the lower limit of the range toward the mid-point or even eliminating any adjustments on the lower side altogether.[256] Finally, MCI, Ad Hoc, and Maryland PC charge that the various suggestions by LECs to widen or otherwise modify the range are simply evidence of their gamesmanship and overall strategy to exploit price caps to achieve enormously increased earnings.[257]

136. Virtually all LECs contend that, if the automatic stabilizer is adopted, it should be a transitional, temporary measure, scheduled to terminate at the end of the first four-year performance review. They believe

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252 Maryland PC Comments at 5-6 (citing Refinement of Procedures and Methodologies for Represcribing Interstate Rates of Return for AT&T Communications and Local Exchange Carriers, Notice of Proposed Rulemaking, 2 FCC Rcd 6491 (1987)).

253 Id.

254 See, e.g., New York DPS Comments at 8; Florida Citizens Comments at 4.

255 See, e.g., Colorado OCC Reply at 5 (stating either that the range should be narrowed or that there should be profit sharing); Indiana UCC Comments at 36-37 (recommending a 1 percent upper limit).

256 See, e.g., Missouri PSC Comments at 5-6 (recommending that the upper limit be lowered by 1 percent and the lower limit raised by 1 percent); New York DPS Comments at 6-8 (recommending that LECs be required to make special showings when they exceed the upper limit but that the lower limit be eliminated); Indiana UCC Comments at 34-37 (recommending that the upper limit be lowered by 1 percent and the lower limit be eliminated); Ohio Counsel Comments at 4 (recommending that the lower limit be eliminated).

257 MCI Reply at 20-22; Maryland PC Reply at 10-11; Ad Hoc Reply at 19-22.

that this period is adequate to determine a reliable productivity factor and contend that there is no other sufficient reason to prolong the stabilizer's disincentives.[258] Executive Agencies replies that it would be premature to schedule expiration now,[259] and Colorado OCC replies that the stabilizer should not be a temporary measure because it fulfills a long term need to keep rates aligned with costs.[260]

137. Several commenters respond to the Commission's request in the Second Further Notice for comment on the possibility of a refund mechanism applicable to earnings beyond the stabilizer's upper range and for comment on the manner in which such a mechanism is consistent with AT&T v. FCC, which rejected the Commission's Docket 84-800 automatic refund mechanism.[261] Bell Atlantic and Rochester respond that a refund provision would conflict with that court decision unless there were a corresponding recoupment provision, while PRTC argues that smaller LECs would have insufficient protection without such recoupment.[262] BellSouth states that a refund mechanism would damage the incentive structure of price caps.[263] Michigan PSC Staff, Allnet, and NY Clearinghouse believe that the absence of a refund mechanism is unfair to ratepayers and possibly unlawful.[264]

138. Several commenters propose the addition of sharing mechanisms to the automatic stabilizer to limit excess earnings without completely vitiating incentives to efficiency. AT&T suggests an equal sharing between carriers and customers of any earnings over the target rate of return, implemented through annual prospective adjustments to the price cap index. It

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258 Ameritech Comments at 12-16; BellSouth Comments at 11, 15; NYNEX Comments at 17-18; Pactel Comments at 40-41; US West Comments at 9-10 (noting that some "transitional" rules never seem to go away and offering a "sunset" amendment to the proposed price cap rules); Centel Comments at 13; CBT Comments 10; GTOC Reply at 17; Rochester Comments at 17-18; SNET Comments at 16 (also offering a "sunset" amendment). Accord SBA Comments at 22.

259 Executive Agencies Reply at 5.

260 Colorado OCC Reply at 3-4.

261 See Second Further Notice, 4 FCC Rcd at 3217-18 (para. 713).

262 Bell Atlantic Comments at 8 n.21; Rochester Comments at 18 n.37; PRTC Comments at 5-6. Cf. Maryland PC Reply at 10-11.

263 BellSouth Comments at 11 n.22.

264 Michigan PSC Staff Comments at 5; Allnet Comments at 5-6; NY Clearinghouse Comments at 9-10.

also suggests a formula in which a LEC's share declines as its experienced return deviates further upward from the target level and a formula for sharing of underearnings.[265] NY Clearinghouse recommends a similar plan, except that excess returns earned during the lag preceding the annual adjustment would be refunded.[266] A number of LECs reply that a sharing mechanism would prolong rate of return disincentives and that the current proposal already has an assured form of sharing in the Consumer Productivity Dividend.[267]

139. Finally, New York DPS discusses the possibility that an approach similar to its own rate case moritoria, which establish multi-year revenue requirements based on specific rates of return, would be suitable for the Commission. It concludes, however, that with the large number and diversity of the carriers regulated by the Commission, an approach using indexing and automatic mechanisms, such as the proposed stabilizer, is the only practical alternative and is superior to rate of return regulation.[268]

3. Alternative of a Two-Year Review

140. Several commenters state that the Commission's alternative proposal of an early performance review after the second year of price caps would be preferable to the automatic stabilizer, at least as the lesser of evils, or would be worthwhile in addition to the stabilizer.[269] For example, BellSouth states that the shorter review period is theoretically more consistent with "pure" price caps and would do less damage to the intended incentives.[270] Lincoln maintains that it would provide relief for some of the

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265 AT&T Comments at 24-25. See also Ohio PUC Comments at 4-5. Accord Illinois Reply at 13-14; Colorado OCC Reply at 6; Ohio Counsel Reply at 3.

266 NY Clearinghouse Comments at 9-11.

267 Ameritech Reply at 26-27; BellSouth Reply at 38-42 (also contending that sharing would constitute a prescription under Section 205 of the Communications Act, with attendant procedural requirements); SWB Reply at 28-31; GTOC Reply at 13-18; USTA Reply at 24-25.

268 New York DPS Comments at 3-6.

269 BellSouth Comments at 10-11; Centel Comments at 5-8; Lincoln Comments at 6-7; Missouri PSC Comments at 6 (expressing support); NARUC Reply at 8; Ohio PUC Comments at 13-14 (expressing support for both the early review and the stabilizer); SBA Comments at 21-22 (expressing support).

270 BellSouth Comments at 10.

LECs which fall short of the productivity offset, but could be too late for others.[271]

141. Other commenters express firm opposition to an early performance review on the ground that it would distort incentives to efficiency and innovation and would allow an insufficient time for the generation of reliable data.[272] For example, Bell Atlantic argues that the benefits of price caps will only be realized over time and an unduly short review could lead to a distorted view of those benefits.[273] NYNEX states that there would not be adequate time for the results of carrier investment decisions and efficiency efforts to materialize, and it cites as an example the long lead time between decisions to upgrade network infrastructure and the results therefrom.[274] Alltel claims that the two-year review would provide insufficient time for the market to adjust to the new system and insufficient data, especially because the long lead time needed to collect data means that scarcely more than one year of data would be available. SNET argues that two years is insufficient time to gain experience with the productivity factor and suggests that if a major problem arises during the four-year period, a LEC could petition for a rulemaking or this Commission could initiate one on our own motion.[275]

142. MCI notes that the Commission stated in the Second Further Notice with respect to AT&T's performance review in the fourth year that an earlier review would present disincentives for efficiency because carriers fearing quick recapture of productivity gains would be less likely to make efficiency enhancing decisions, resulting in repetition of the flaws of rate of return regulation.[276] DC PSC claims that the shorter review period would

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271 Lincoln Comments at 6-7.

272 Bell Atlantic Comments at 8 n.21; NYNEX Comments at 16; Pactel Comments at 38-39; Alltel Comments at 38-40; Contel Comments at 13; CBT Comments at 10-11; Rochester Comments at 16-17; SNET Comments at 18; United Comments at 2-3; MCI Comments at 32; USTA Comments at 27-28; DC PSC Comments at 4-6; Illinois Reply at 12-13; Justice Reply at 21; Executive Agencies Comments at 10; NCTA Reply at 20-21; NY Clearinghouse Comments at 10 n.8.

273 Bell Atlantic Comments at 6 n.18.

274 NYNEX Comments at 16-17.

275 SNET Comments at 2-3.

276 MCI Comments at 31-32, (citing Second Further Notice, 4 FCC Rcd at 3143 (para. 560)).

dampen LEC incentives to efficiency and that, unlike AT&T which faces competition, the LECs would then have no other incentive for efficiency than the blunted one from the price cap formula.[277] Illinois contends that after only two years, it may be difficult to assess whether fluctuations from historical trends are attributable to price caps or merely to short-run business decisions and business cycles.[278] Finally, NY Clearinghouse argues that the earlier review is undesirable because it provides no meaningful oversight for more than two full years and because it is not coupled with a refund mechanism.[279]

C. Discussion

143. Having less corroborative evidence concerning LEC productivity than we did for AT&T presents us with a dilemma. If expected productivity for the LEC industry as a whole deviates sufficiently from long term trends, use of a price cap formula that adjusts prices with reference to a long term 2.5 percent productivity offset may not produce the incentives we seek to create or the consumer benefits we seek to obtain. In addition, we are aware of the possibility that of the hundreds of firms for which price cap regulation is proposed to be mandatory or voluntary, some may deviate substantially from the industry average on a sustained basis.[280] For these reasons, the Commission tentatively found that an automatic stabilizer device is useful tool that enabled it to design a system in which possible error in the size of the productivity offset is not compounded over time. Our examination of the stabilizer device proposed in the Second Further Notice, however, reveals that it may be possible to improve the proposal by

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277 DC PSC Comments at 5.

278 Illinois Reply at 12-13.

279 NY Clearinghouse Comments at 10 n.18.

280 Our concerns about deviation from the industry norm stem from productivity studies of other industries. A study by Caves, Christensen, and Trethway found annual productivity gains of regulated trunk airlines ranging from 0.7 percent to 5.2 percent, with nine other carriers spaced evenly between. Caves, Christensen, and Trethway, "U.S. Trunk Air Carriers, 1972-77: A Multilateral Comparison of Total Factor Productivity," in Cowing and Stevenson, Productivity Measurement in Regulated Industries (1981). Gollop and Roberts estimate productivity for 11 electric power companies for the period 1958-1975. They find a productivity range from 1.8 percent to 6.8 percent. Gollop and Roberts, "The Sources of Economic Growth in the U.S. Electric Power Industry," in Cowing and Stevenson, Productivity Measurement in Regulated Industries (1981).

prescribing the stabilizer zone under our Sections 205 and 4(i) powers to create an earnings "zone of reasonableness" for price cap carriers. In addition to prescribing the stabilizer zone, we also propose that carriers be required to share earnings with ratepayers as earnings increase. Sharing would be accomplished by requiring carriers to make prospective adjustments to their price cap indexes reflecting a proportion of their actual earnings, increasing the proportion as earnings levels increase. We turn first to arguments that the stabilizer is not a useful or desirable addition to the LEC price cap plan, and then explain the modifications to the stabilizer we propose to make.

1. Economic Justification for the Stabilizer

144. The proposed automatic stabilizer in the Second Further Notice was designed to address the fundamental economic problem of how a regulator can ensure that rates track costs, in the face of uncertainty regarding future changes in a firm's costs. The proposed stabilizer was to accomplish this by using actual earned returns as feedback to retarget rates to a range defined by two percentage points on each side of the currently prescribed rate of return. If a carrier's earned returns fell within that range, no adjustment would be made and the carrier would retain its earnings. If a carrier's earned return was above the range, however, its price cap index would be adjusted downward to bring its targeted return to the top of the range. A similar adjustment would be made for earned returns below the range. The proposal described index adjustments that were prospective only.

145. In general, a regulator (and to some extent the firm itself) faces uncertainty and error of two different kinds. The first is random error, the natural variation in a period's actual costs around an accurate long term trend. This variation should by definition average out over time to be zero. The second kind of uncertainty is systematic error, a potentially large and long term deviation from the historical trend which may never correct itself over time without some external intervention by the regulator. Both sorts of error carry risks, but it is systematic error which imports the most serious ones. The regulator must assess and pool these risks, much as is done in a classical insurance contract, to achieve a balance of interests between ratepayers and shareholders of the regulated company.

146. The problem for the regulator is, of course, to differentiate these two types of error. One way for the regulator to do so is to implement a mechanism which would constrain large, potentially hazardous deviations but not smaller, relatively expected ones. That is, the regulator could utilize a device which would employ actual operating data on the firm's performance as feedback to correct for large deviations, which would indicate some systematic error, but to disregard smaller ones, which are presumably random errors. Ideally, the mechanism should do this in a way which preserves the firm's incentives for efficiency and innovation.

147. There is a range of possible correcting devices of this kind. At one extreme, there is no feedback at all, amounting to a fixed price contract (i.e., pure price caps). Here there is no limit on net profits or losses, and the firm will have a continuing incentive for higher efficiency and earnings above the norm. By the same token, however, the firm incurs a considerable degree of risk. At the other extreme, there is total feedback, amounting to a cost-plus contract (i.e., pure rate of return). Here there is an absolute limit on net profits and losses (i.e., the break-even point), and the firm has no incentive for higher efficiency and earnings above the norm. The firm in such a cost-plus contract incurs almost no risk. The risk of higher price falls solely on the customers.

148. The economic literature on this area tends to locate the most desirable alternative at various points between these extremes, so that the firm and its customers share the risk of uncertainty to some extent. In fact, some studies demonstrate that, in an environment of uncertainty about costs, the optimal solution is to craft a system where ratepayers and shareholders share the risk that the regulatory model may not be a completely accurate predictor of cost. Schmalensee[281] examines the effect of regulatory reform in an environment which is completely specified by the values of four parameters: (1) demand elasticity, (2) the regulated firm's expected cost savings as a fraction of unit cost, (3) maximum expected exogenous cost changes as a fraction of unit cost, and (4) the level of uncertainty attached to the cost savings that would occur if price were fixed at unit cost. The regulator sets the price the firm may charge under the regulatory reform equal to the pre-reform price, plus a cost sharing fraction, times the difference between observed unit cost and the unit cost before the regulatory reform. If the cost sharing fraction is zero, this is a pure price cap scheme; if the cost sharing fraction is between zero and one, this is a price cap scheme with some sort of sharing device (such as our automatic stabilizer); and if the cost sharing fraction is one, this is a cost-plus scheme.

149. Schmalensee compares, for five plausible values of each of the four parameters listed above (for a total of 625 possible variations), the total social welfare and consumers' surplus gains to the gains that would be expected if price were set at marginal cost. In no case where uncertainty existed, i.e., where the values of (3) and (4) above were not both zero, was a regulatory scheme with no cost sharing the optimal scheme. In general, he concludes, in the presence of uncertainty about cost reduction opportunities and future costs, regulatory regimes which involve cost sharing produce higher social and consumer welfare than those which do not involve such sharing.

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281 R. Schmalensee, "Good Regulatory Regimes," Rand Journal of Economics, Vol. 20, No. 3, Autumn 1989 at 417-36.

150. Similarly, Laffont and Tirole[282] posit a regulator seeking to maximize consumer surplus subject to the continued viability of the firm. The regulator observes the firm's output and costs, but not its efficiency or effort, nor any random cost changes which may occur. The firm knows its efficiency, and chooses its level of effort, which together determine its actual costs. In the face of this information asymmetry and uncertainty about future costs, Laffont and Tirolle conclude, it is never optimal to maintain fixed prices rather than provide some type of revenue sharing mechanism.

151. A number of parties argue, however, that the risk-sharing mechanism we have created dampens incentives, and is evidence that incentive regulation will not work for LECs. The two studies discussed above argue that, in the presence of uncertainty about future costs, regulatory regimes which include some sharing of overearnings provide greater welfare than those which do not. In addition, the placement of the upper and lower ends of the zone can mitigate any negative effects. For example, in the Second Further Notice, the Commission cited its own initial computation indicating that an average LEC would experience approximately a 0.4 percent change in its rate of return for each 1.0 percent change in productivity relative to economy-wide productivity. On this basis, an average LEC would have to become approximately 2.5 percent more productive than it was under existing regulation for its rate of return to increase by approximately 1 percent.[283]

152. Given this analysis, an average LEC under the proposed 3 percent productivity offset in our plan would have to generate a positive productivity differential of 5.5 percent relative to the general economy to raise its rate of return one point above the 12 percent target rate of return currently prescribed. At the other extreme, an average LEC that was only able to lower its costs 0.5 percent relative to inflation in a given year would see its rate of return drop 1 percent. This analysis was not impeached in the current round of pleadings. A more detailed and thorough analysis of this kind would shed considerable light on how a stabilizer zone could be reasonably fashioned to induce significantly increased efficiency within its bounds. We request comment on more detailed and focused applications of this approach and other possible approaches to the same issue of quantifying the relation between LEC productivity and rate of return.

153. Other support for the stabilizer exists, as well. Some authorities recommend that regulators create a range of earnings of sufficient width to ensure that most normal or random variation does not trigger a corrective response, whereas a serious, systematic deviation

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282 Laffont and Tirole, "Using Cost Observations to Regulate Firms," J. Pol. Econ. (1986).

283 Second Further Notice, 4 FCC Rcd at 3213-14 (para. 705).

does.[284] Furthermore, society can and does limit the returns even the most competitive of firms makes.[285] Our proposed price cap system attempts to create operating incentives that are as effective as those in the competitive marketplace, which themselves do not give unlimited incentive to efficiency and innovation.

154. The automatic stabilizer proposed in the Second Further Notice was designed primarily to ensure that LEC earnings under price cap regulation remain within a zone of reasonableness in the face of some degree of uncertainty in the proposed productivity offset of 2.5 percent. This uncertainty applies to both productivity differences among LECs and to the possibility of inaccurate specification of average productivity for LECs as a whole. In either case, the effectiveness of the proposed automatic stabilizer, and the basic arguments for or against it in the comments before us, can be assessed by comparing different scenarios with correct or incorrect productivity offsets.

155. In the first scenario, assume our proposed 2.5 percent productivity offset is basically correct in the sense that it does not constitute systematic error as defined above. Also assume that the width of the stabilizer is designed to provide incentives for efficiency. In this case, the stabilizer would produce some advantages and almost no disadvantages. The upper range would provide a real, compelling challenge for LECs to increase their productivity. This upper range would, however, be high enough that very few LECs would experience any significant constraints on their potential productivity. Moreover, those few LECs who might succeed in reaching the upper portion of the range and earning relatively high rates of return compared to the target rate under the present regime would be entitled to it by the enhanced productivity which they were able to muster. Similar considerations would apply on the lower end of the range. Those LECs who lagged behind should be requited accordingly. If, however, they did so poorly that they sank to the bottom of the range, they would genuinely need the upward adjustment.

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284 Johnson, "Incentives to Improve Electric Utility Performance," Rand, 1985.

285 For example, successful inventions permit firms to earn high returns where the invention is protected by a patent. The amount a firm can earn, however, is limited by two factors. First, successful inventions can be imitated so long as the imitation does not employ the patented invention. Second, society itself limits the life of a patent. See R. Nelson, The Rate and Direction of Inventive Activity (1960); W.D. Nordhaus, Invention, Growth and Welfare (1967); J.F. Reinganum, "The Timing of Innovation: Research, Development and Diffusion," in R. Schmalensee and R.D. Willig, Handbook of Industrial Organization (1989).

156. In a second scenario, assume we understate the productivity offset to some extent, in the form of a systematic error as discussed above, but assume that the width of the stabilizer range is designed to provide incentives for efficiency. Here the LECs' real capacity to improve productivity would be greater than anticipated, and it would be correspondingly easier for them to rise up through the upper part of the range. This would tend to result in a greater amount of blunted incentives and relatively higher rates of return than in the previous example. On the other hand, a significantly wide stabilizer range would operate to counteract this tendency, and the net result could still be positive in terms of one of the objectives of incentive regulation, improving efficiency. The most important point, however, is that the upper limit of the range clearly defines the potential negative effects from incorrectly specifying productivity.

157. In the third scenario, assume we overstate the productivity offset to some extent, in the form of a systematic error, but assume the width of the stabilizer range is still sufficient to generate efficiency incentives. Here the LECs' real capacity to achieve or exceed the productivity offset would be less than anticipated, and it would be correspondingly difficult for them to rise even into the top half of the stabilizer range. This would tend to result in relatively low rates of return. Again, the most important point is that there would be an absolute boundary on the negative effects of incorrectly specifying productivity.

158. Similar analyses could be made using different widths of the stabilizer range and other variables. Overall, these analyses show that the automatic stabilizer operates as a trade-off: in return for the enormous advantages that incentive regulation could realize, there is a risk that some firms may dramatically prosper while others languish, and it will not be immediately apparent the extent to which this reflects their true operational soundness or is the result of the new approach to regulation. In the face of less corroborative data about LEC productivity, we tentatively conclude again that the risk-sharing features of the stabilizer helps ensure that the plan will function as intended. We request comment on this analysis.

2. Proposed Modifications

a. Prescription and Prospective Index Adjustments

159. Our ability to achieve the proper balance between the advantages and disadvantages described above may be enhanced by fine-tuning some of the existing elements and by adding new ones. Our review of the stabilizer mechanism, in light of the record we received in response to the Second Further Notice, reveals that such efforts may better protect ratepayers and ensure that the mechanism is properly targeted to produce the incentives we seek to create.

160. Under the proposal set forth in the Second Further Notice, the bottom of the automatic stabilizer zone is used solely for making annual prospective, upward adjustments to the price cap indexes of carriers whose actual earnings for an historical base year fall below that bottom level. The stabilizer does not function to inhibit carriers from filing above-cap rates whenever they believe the price cap formula will produce unsatisfactory earnings. It is conceivable that carriers finding themselves with earnings performances at the bottom of the zone -- or indeed, anywhere below the midpoint of the zone -- might routinely make above-cap filings arguing that, as to them, a 3 percent productivity offset is confiscatory. Under the proposed rules set forth for price cap tariff filings, such carriers would file detailed support information explaining the manner in which all costs have been allocated among baskets, and a cost assignment showing down to the lowest possible level of disaggregation, including a detailed explanation of the reasons for the prices of all rate elements to which costs are not assigned.[286] We could suspend such a filing, but we would be required within twenty months to readjudicate our productivity determinations on a carrier-specific basis.[287]

161. Similarly, the top of the automatic stabilizer zone proposed in the Second Further Notice serves only to make annual, prospective downward adjustments to the price cap indexes of carriers whose base year earnings were above that top level. The stabilizer does not definitively establish the reasonableness of earnings above the midpoint. This feature of the stabilizer may undercut the incentives to efficiency that lie at the heart of this proceeding. Anytime a carrier earned more than the rate of return we prescribe for rate of return carriers, a customer could file complaints that the LEC's rates are too high and seek reparations through the complaint process. While the rate of return prescription per se would not be applicable to price cap carriers, this Commission could nevertheless be constantly embroiled in a process of readjudicating our productivity determinations in complaint proceedings.

162. One way to address these concerns is to prescribe a zone of reasonableness within which earnings can fluctuate. The zone would be bounded on each end by a "formula adjustment" mark. Prescribing a lower "formula adjustment" earnings level for price cap carriers may help ensure that the risk and reward system we seek to create with incentive regulation can be

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286 See Section 61.49(e) of the Commission's Rules.

287 Carriers are required to file tariff revisions on no less than 90 days, notice, pursuant to Section 203(b)(1) of the Communications Act, and this Commission may suspend the effective date of the revision for no longer than five months, pursuant to Section 204(a)(1) of the Act. An investigation of the tariff, should we elect to investigate, would need to be concluded within 12 months of the date the investigation began. 47 U.S.C. 208(b).

sustained in practice. Carriers who in an historical base year earned below the lower "formula adjustment" target will be permitted to adjust their price cap index levels upward to a level that would enable them to earn a return equal to the "formula adjustment" earnings level. On the other hand, because the lower formula adjustment target represents a Commission determination that the level is just and reasonable, carriers would not be able to file above-cap rates that employ a target earnings level above the lower "formula adjustment" mark. Similarly, carriers that are earning above the target return for rate of return carriers, but within the price cap zone, would be protected from complaints that their earnings levels are unreasonable and the risk of reparations forcing them to give back the financial yield of their efforts to increase productivity. We also propose to make a prospective downward adjustment to price cap indexes whenever a carrier's earnings in an historical base year rise above a specified earnings level we will term the upper "formula adjustment" mark. Our proposal to adjust prospectively price cap index levels ensures that a possible error in the selection of the productivity offset is not compounded over time. We tentatively propose the option of a prescribed zone of reasonableness as an alternative to the Second Further Notice proposal, and we seek comment on the relative strengths and weaknesses of each approach. We request comment on this proposal.

b. Sharing

163. Another possible means of strengthening consumer benefits under our proposed incentive system is to require that earnings above a certain level be shared in increasing proportions with consumers. In the Second Further Notice, the Commission proposed, in the tariff review context, that carriers would retain earnings in any given year, and a carrier's price cap indexes would be adjusted prospectively at the time of the annual price cap filing to ensure that the effects of a possibly inaccurate productivity offset would not be compounded. In deciding to prescribe a zone of resonableness for price cap carrier earnings, we tentatively find that our proposal needs to be modified in light of the new risk balance presented by a prescribed earnings zone. In addition to selecting a lower "formula adjustment" return " level triggering an upward adjustment in price cap indexes, and an upper "formula adjustment" return level that would trigger a downward adjustment to price cap indexes, our proposal is to select an earnings level below which the carrier could retain all its earnings and above which the carrier would share earnings with ratepayers. As the historical level of earnings increases, a carrier would be required to share an increasing amount with ratepayers.

164. By way of illustration, let us consider an example where sharing starts at 14 percent.[288] The example that follows should be

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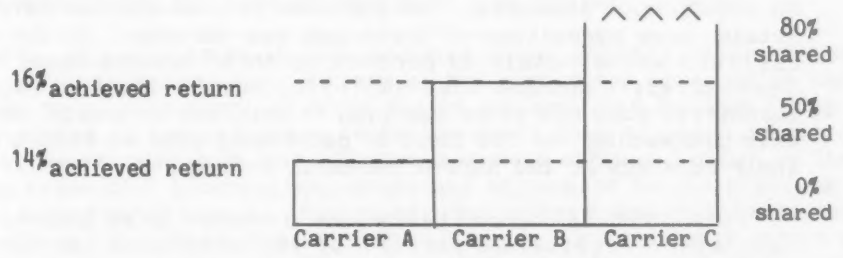
288 The prospective adjustment to a carrier's price cap indexes from the upper "formula adjustment" mark operates in addition to sharing, i.e., it

considered as illustrative only. We are not in this Supplemental Notice proposing that sharing begin at any particular level of return, or selecting any particular level or amount of sharing. We will discuss in the following section how we intend to select the lower and upper "formula adjustment" levels, the point at which sharing begins, and the percentage earnings to be shared.

165. In an example using three steps where sharing starts at a 14 percent return, sharing would be handled as follows:



All three carriers would retain all of their returns up to 14 percent. Once a return exceeded that amount, sharing would begin. In this example, carriers B and C would share with ratepayers half of their base year returns in the increment between 14 and 16 percent. Carrier C would also share 80 percent of its incremental return above 16 percent. Those earnings a carrier does not share with ratepayers it would be permitted to retain as a reward for becoming more productive.

166. There are many possible variations of the sharing device. The selection of the point at which sharing begins, the number of sharing increments or "steps," the size of the increments (i.e., sharing increases every percentage point, or every two percentage points), and the amount of sharing can all be changed to produce different varieties of the mechanism. We are not here concerned with the identification of these return levels and sharing amounts, and we are not soliciting comment on the return levels and

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ensures that a price cap carrier's actual historical earnings over a certain specified level will trigger a prospective downward price cap index adjustment to a level sufficient to produce future earnings no higher than the formula adjustment level described above. Thus, a carrier with high earnings may find itself with two prospective adjustments to its price cap index levels, one to accomplish sharing, and one to drive its return to the upper formula adjustment mark in the upcoming year. The level at which sharing begins and the upper formula adjustment level need not be identical.

sharing amounts we have used to illustrate the mechanics of the device. Our purpose is to solicit comment on the use of a sharing device that employs the following characteristics: (1) the selection of a level of return in a base year that triggers the sharing mechanism; (2) the decision to require carriers to share earnings with ratepayers when base year returns are at or above the "trigger" level; and (3) the decision to require carriers to taper the sharing mechanism so that carriers retain less of a percentage of returns the higher their base year earnings were.

167. At the top end of the sharing mechanism, we propose that the final sharing increment or "step" continue to provide incentives for carriers to become more productive. We therefore propose that carriers be permitted to retain some percentage of their base year earnings. In the example we used, carriers would retain 20 percent of their returns above 16 percent. We tentatively conclude that employing such a device keeps in place the incentives that the price cap plan is intended to create. We seek comment in this proceeding on the issue of permitting LECs to retain some portion of their earnings at the highest increment or "step."

168. Alternatively, we propose that beyond the top step, ratepayers receive 100 percent of any additional carrier earnings. For example, sharing could begin at a return of 14 percent, with the carriers retaining all earnings up to that point in the manner described previously; for the next increment of earnings between returns of 14 percent and 16 percent, sharing would be an equal 50 percent split between carriers and ratepayers; and for all returns of 16 percent and above, ratepayers would receive all further earnings, i.e., a share of 100 percent of such additional earnings. We seek comment on whether this type of mechanism properly balances the incentive objectives and public interest objectives we seek to create with the price cap rules.

169. The proposal for ratepayer recoupment of earnings in increasing steps as the earnings levels increase is a natural extension of the proposal for the Consumer Productivity Dividend. With sharing in place, ratepayers will be able to share further in the benefits of an incentive system. Our tentative view, that such a device better balances the risks associated with incentive regulation, stems as well from the degree of uncertainty associated with the productivity offset we have selected. If LEC productivity varies from the long term trend we have identified, the ability of the Consumer Productivity Dividend to yield consumer benefits may be affected. We are particularly concerned that if a LEC's productivity gains are large with respect to the offset we have selected, the Consumer Productivity Dividend will not yield the measure of consumer benefits that represents a true sharing of the rewards the LEC receives in the form of increased earnings. Our proposal to incorporate an additional sharing device remedies that concern.

170. Our instant proposals to prescribe the stabilizer zone and to require sharing of carrier earnings above a specific level constitute

significant changes from the Second Further Notice and its predecessors. This substantially alters the Commission's previous characterization of the price cap limits as merely defining tariff review standards for a no-suspension zone. While the tariff review portion of our LEC price cap plan remains supported by the same legal theory as our AT&T price cap regime, the addition of the prescribed stabilizer zone adds a new element to the analysis for our legal authority to implement the LEC price cap plan.[289] We believe that our revised proposal is consistent with our statutory powers and duties under the Communications Act and that it will ensure just, reasonable, and non-discriminatory rates. We also believe, however, that parties should have a full opportunity to comment on it, particularly with respect to Sections 204, 205 and 4(i) of the Act, and we invite all such relevant comments.

171. As we envision it, the decision about whether either of the sharing devices is triggered would be made at the time of the annual price cap filing. Based on a LEC's earnings level during the base year for that filing, we would determine if earnings were above the level that triggers sharing. If they were, we propose that the LEC flow excessive earnings through to its customers by means of a prospective exogenous adjustment to its price cap index.[290] Alternatively, it is possible the shared amounts could be identified with particular customers of the LECs, i.e., interexchange carriers and large end users, insofar as sufficient records to identify the recipients and compute the amounts were available; the balance could then be flowed through the price cap index as described immediately above. We invite comment on these proposals, as well as any other stabilizer proposals the parties may wish to suggest.

172. We wish to clarify that the sharing devices we are proposing here are substantially different than the automatic refund mechanism struck down in AT&T v. FCC, supra. In that case, an automatic refund was applied to all earnings in excess of the unitary rate of return, with no corresponding

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289 Second Further Notice, 4 FCC Rcd at 3295-3307 (paras. 880-895).

290 Actually, the carrier in this alternative would be required to make two adjustments to its price cap indexes. The first adjustment, already proposed in the Second Further Notice, would implement a prospective reduction in the price cap index level sufficient to bring the carrier's return down to the upper "formula adjustment" mark in either of our two proposals, so that the condition which caused the excess in the base year is not perpetuated in the next year. The second adjustment, not proposed in the Second Further Notice but proposed here, would be an exogenous cost adjustment that would enable ratepayers to share earnings above a certain level during the course of the upcoming price cap tariff year. At the end of the year, an upward exogenous cost adjustment would be made to reflect the fact that sharing of the excess earnings had been completed.

automatic correction for earnings below it. In our instant proposals, however, earnings are shared with ratepayers in a manner that ensures that carriers can retain earnings within a price cap zone of reasonableness if they can generate such earnings. The sharing we propose could not force the carrier's average return below the zone of reasonable earnings we propose to create. Our proposal to increase prospectively a carrier's price cap indexes to the lower "formula adjustment" level ensures that carriers will have a reasonable opportunity to earn within the price cap zone of reasonableness.

173. We also tentatively conclude that the prospective price cap index adjustments and the sharing devices should be triggered by total interstate earnings in the base year. Since the outset of this rulemaking, one of the major objectives has been to reduce reliance on complex cost allocation systems, such as fully distributed costing, which can create distorted economic signals. For this reason, the Second Further Notice sought to rely as much as possible on total interstate earnings rather than subsets of such earnings as criteria for various regulatory determinations. However, due to the overriding importance of the Long Term Support mechanism that is administered on the basis of a separately identified common line revenue requirement, the Second Further Notice proposed to maintain a two-part cost allocation between the common line revenue requirement and all other interstate revenue requirement for the limited purpose of calculating Long Term Support.[291]

174. While we tentatively decide to use total interstate earnings as the triggering mechanism for prospective adjustments in the cap and for sharing, we also seek comment on whether a more subdivided cost allocation system should be employed. For example, if earnings above certain levels are to be shared with ratepayers, one possible means of executing a sharing arrangement is to direct sharing to the customers who paid the rates that yielded the earnings levels, to the extent this is administratively feasible. We seek comment on this and other instances in which our shift to a prescribed stabilizer zone and sharing might call for alterations of various proposals in the Second Further Notice. In some cases, allocation by baskets may be desirable, and there could be such subdivision for some purposes but not others.

175. We seek comment on the proposal to prescribe a stabilizer earnings zone, and on the proposal for a device that shares earnings above a specific amount with ratepayers. We also seek comment on our proposal for prospective annual adjustments to the price cap indexes as a means of compensating for a possibly inaccurate productivity offset. In addition, we seek comment on the mechanisms we would use to effectuate sharing. Commenters are asked to comment on our sharing proposal involving a tapered or "stepped"

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291 Second Further Notice, 4 FCC Rcd at 3277 (para. 841).

mechanism that permits carriers to retain some proportion of their base year earnings, even at the highest point in the taper (or at the top "step"). Commenters are also asked to comment on a sharing mechanism that requires carriers to share all of their returns at the highest point in the taper (or at the top "step"). We are requesting comment on the mechanics of these devices only. We are not in this proceeding proposing specific earnings levels that would trigger sharing, earnings levels associated with various steps, the number of steps, or the amounts of sharing associated with the steps leading to the top of the taper. We are particularly interested in receiving comment on whether carriers should be permitted to retain some earnings at the highest point in the taper, or whether all earnings should be shared with ratepayers.

176. We do not desire comment on the return levels that appear in the example we used to illustrate the tapered sharing mechanism. Interested parties seeking to comment on the selection of specific return levels and sharing amounts will have ample opportunity to do so, but in an expanded represcription proceeding as described below. In the event we decide, on the basis of the record received in response to this Supplemental Notice, to adopt the prescribed zone of reasonableness or either of the sharing devices, the precise parameters of that earnings zone and the selection of the parameters of the sharing device will be the subject of a separate Commission action. We describe our proposed procedural schedule in the following section.

c. Expansion of the Represcription Proceeding

177. In the Second Further Notice, the Commission proposed an automatic stabilizer device that would trigger price cap index adjustments once earnings levels reached plus or minus 2 percent deviation from the target rate of return for rate of return carriers. Now that we have tentatively decided to prescribe an automatic stabilizer earnings zone and a sharing device, we are not convinced that the proposal defining the zone contained in the Second Further Notice is optimal.

178. The size of the proposed zone contained in the Second Further Notice was derived from rate of return data that is now five years old. Moreover, adding 200 basis points to a target rate of return prescribed for rate of return carriers may produce high rates of return on equity for some carriers. Likewise, subtracting 200 basis points from a prescribed overall rate of return could produce low returns on equity for some carriers. In addition, it is not clear that the best stabilizer zone is one that is symmetrical with respect to the target rate of return for rate of return carriers, or that it should automatically change when the rate of return is represcribed for rate of return carriers.

179. Under rate of return, when this Commission prescribes earnings limitations, we do so in the context of careful quantitative analyses

of the current costs of capital of both telephone companies and of a wide range of nonregulated firms. We hear and evaluate extensive argument concerning the financial and business risks faced by the carriers. We then locate a target rate of return within a broad zone of reasonableness. We tentatively believe that a similar approach ought to be taken to defining the lower "formula adjustment" mark and the upper "formula adjustment" mark limits for price cap carriers. An analysis that takes into account current market conditions and the risks carriers would face under our proposed price cap system, including the modifications we are proposing in this Notice, may be a preferable method of determining a price cap earnings zone and sharing mechanism than the method used in the Second Further Notice.

180. The data we would need to make the risk assessment central to prescribing an earnings zone of reasonableness, we believe, is in large measure the same financial data we collect to determine a target rate of return for rate of return carriers. Given that we have recently initiated a represcription proceeding, we can easily expand our ongoing represcription proceeding to add determination of certain of the issues which we have discussed here.[292] Thus we can address in that forum the various return levels marking the boundaries of a price cap earnings zone, as well as the sharing device and amounts of earnings to be shared. We can explore there the many variables which may be involved in the multi-step sharing proposals, including the number steps, the rate of return level of those steps, the percentage of sharing at each step leading up to the highest point in the taper, and similar matters.

181. We believe that expanding the represcription proceeding at this point to add the price cap stabilizer and sharing issue would not disrupt our ongoing efforts to represcribe a target return for rate of return carriers under our Part 65 rules. In the event we decide in this rulemaking not to prescribe the automatic stabilizer, we can simply not decide the price cap issues at the time we represcribe a target for rate of return carriers. Because expansion of the represcription proceeding now will preserve our procedural options in this price cap rulemaking, and will not disrupt our ability to reach a final conclusion on the target rate of return for rate of return carriers, the represcription proceeding will be expanded to include possible selection of a price cap stabilizer zone and sharing mechanism. We believe that modest adjustments in the filing schedule can be made to provide an additional opportunity for parties to file Notices of Appearance and to provide the expert testimony on selection of the price cap zone and sharing

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292 See Refinement of Procedures and Methodologies for Represcribing Interstate Rates of Return for AT&T Communications and Local Exchange Carriers, CC Docket No. 87-463, and Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, CC Docket No. 89-624, 5 FCC Rcd 197 (1989) (Interim Represcription Order).

device that we would need to draw on at the conclusion of the proceeding. We delegate to the Chief, Common Carrier Bureau, the authority to issue an order revising the filing schedule in accordance with our directions.

182. We therefore seek comment on our proposal to define the prescribed price cap earnings zone, including a specific sharing mechanism, in the ongoing represcription proceeding. We seek comment on the legal, procedural, and policy issues raised by our proposal.

IV. IMPLEMENTATION ISSUES

A. Timing of Implementation

1. Summary of Tentative Findings

183. Under the proposal outlined in the Second Further Notice, Tier 1 LECs who withdraw from the National Exchange Carrier Association (NECA) pools, and other depooled LECs voluntarily electing price cap regulation, would be required to file price cap tariffs on 90 days' notice to be effective July 1, 1990.[293] By initiating price cap regulation on July 1, 1990, rather than an earlier date, this Commission would have enabled depooled LECs, and this Commission itself, to obtain some experience with individual, depooled carrier common line (CCL) and traffic sensitive (TS) tariffs under rate of return before the first price cap tariffs were filed.[294] LECs below the Tier 1 level who continue to participate in the NECA pools would have had until December 31, 1989, to elect to withdraw from those pools to make themselves eligible to elect incentive regulation in the spring of 1990. For carriers depooling at the end of 1989, this Commission believed that its own experience in evaluating the carrier-specific CCL and TS rates filed in connection with the 1989 annual access tariff filings (together with data from NECA settlements) would permit it to evaluate the base period price and demand data that are part of initial price cap filings. The Commission sought comments on this schedule and these tentative findings.

2. Summary of Pleadings

184. A number of parties, led by the LECs, express support for the implementation of incentive regulation for LECs on or before July 1, 1990, and contend that any delay beyond that date would not be appropriate.[295] CBT,

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293 Tier 1 carriers would be regulated under price cap regulation unless the Tier 1 carrier elected to remain a participant in a NECA pool. Affiliates of Tier 1 carriers, except average schedule affiliates, would also be regulated under price caps. All other cost-based LECs and their affiliates may elect price caps on a corporate "all or nothing" basis. Second Further Notice, 4 FCC Rcd at 3176-79 (paras. 623-630). Of the Tier 1 carriers, only Lincoln and PRTC presently remain in the NECA common line pool.

294 See MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, Report and Order, 2 FCC Rcd 2953 (1987)(permitting common line depooling effective April 1, 1989).

295 Ameritech Comments at 5 n.5; Bell Atlantic Comments at 3 n.6; CBT Comments at i, 11-12, 21; Centel Comments at 5; David Comments at 9; Ohio PUC Reply at 5 (supporting implementation on July 1, 1990, but opposing earlier

Centel, and Pactel express concern that any further delay in the implementation of such regulation for LECs would increase the risk of bypass by AT&T.[296] Centel and Pactel also claim that LECs need pricing flexibility as soon as possible to meet access competition.[297] CBT and Pactel add that consumers will not be able to realize the full benefits of incentive regulation until the LECs are able to implement incentive regulation.[298] Pactel argues that if this Commission were unable to issue an order resolving all issues regarding a final price cap plan for LECs in time to permit implementation by July 1, 1990, this Commission should implement, on an interim basis, the plan for LECs set forth in Appendix D to the Second Further Notice.[299]

185. In its comments, USTA proposes an accelerated schedule for the implementation of incentive regulation for the LECs on January 1, 1990.[300] Such an accelerated schedule would, according to USTA, benefit consumers, ensure consistency among subsequent filings by local exchange carriers, and avoid additional administrative burdens for this Commission.[301] A number of

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implementation); NYNEX Comments at 6-7; Pactel Comments at i, 3-6; Rochester Comments at 2; SNET Comments at 12 (asserting outstanding issues can be resolved by that date); SWB Comments at 5; United Comments at 15; USTA Comments at 4, 16-19.

296 CBT Comments at 12; Centel Comments at 5; Pactel Comments at i, 3-6.

297 Centel Comments at 5; Pactel Comments at i, 3-6.

298 CBT Comments at 12; Pactel Comments at 3-6. See also Centel Comments at 4. But see Ad Hoc Reply at 8-9 (staggered implementation for AT&T and the LECs is prudent and consistent with applicable law).

299 Pactel Comments at 6.

300 USTA Comments at 16; USTA Reply at 5 n.11, 13. Under the USTA proposal, January 1, 1990, would be a mandatory implementation date for the BOCs and GTOC and it would also be an optional implementation date for other depooled exchange carriers. July 1, 1990, would have then become a second optional implementation date for other depooled exchange carriers. See also PRTC Reply at 10 (asserting early entry accelerates benefits for customers of LECs subject to incentive regulation, reduces dangers of simultaneous operation of price caps for AT&T and rate of return for LECs, and prevents AT&T from gaining an unfair advantage over LECs in areas where they compete).

301 USTA Comments at i-ii, 17-18. Under the USTA proposal, BOCs, GTOC, and electing depooled carriers would have filed initial incentive regulation tariff revisions on November 1, 1989, with an effective date of January 1, 1990, which revisions would have been based on carrier rates in effect on

carriers that have already left the NECA pools support the USTA proposal to make incentive regulation effective on January 1, 1990, rather than July 1, 1990.[302]

186. Other parties oppose the July 1990 implementation date and urge this Commission to defer incentive regulation of the LECs at least until we have reviewed the results of the initial period of AT&T incentive regulation.[303] For example, Ohio PUC argues that this Commission would not have adequate time to review the record, issue an order, and conduct the necessary tariff review.[304] Metropolitan argues that assertions of AT&T bypass and possible loss of efficiencies are wholly unfounded and unsubstantiated and completely ignore the risks to competition posed by premature adoption of the Commission's proposal.[305] Reflecting its strong opposition to incentive regulation of the LECs, Ad Hoc argues there is ample reason for not only delaying such regulation but also for abandoning the entire incentive regulation proposal.[306]

187. Pactel, GTOC, SWB, USTA, and US West urge this Commission to reject such requests for further postponement or abandonment of LEC incentive regulation and to proceed with implementation as soon as possible.[307] SWB

October 31, 1989. Under the USTA proposal, LEC tariff filings on October 1 and November 1, 1989, would have become effective January 1, 1990, and similar filings on April 2, 1990, would become effective July 1, 1990. USTA said its proposed accelerated schedule would be consistent with the incentive regulation schedule adopted by the Commission for AT&T.

302 Ameritech Comments at 5 n.5; Bell Atlantic Comments at 3 n.6; NYNEX Comments at 6-7; Centel Comments at 4-5; Pactel Comments at 6; Pactel Reply at 3-6; United Comments at 15 (adding that if the Commission released an order on or before October 2, 1989, allowing earlier implementation, LECs opting for earlier implementation would have had sufficient time to do so).

303 LOCATE Comments at 7 (need to await development of competition for access services); Metropolitan Comments at 22-24; Metropolitan Reply at 11-14; Indiana UCC Comments at 38; Alabama PSC Comments at 6; Michigan PSC Comments at 1; Missouri PSC Comments at 1; ICA Comments at 8 (Commission first needs more effective management tools); Ad Hoc Comments at 7 and ICA Comments, ETI Report at 36.

304 Ohio PUC Reply at 5. See also Metropolitan Reply at 14.

305 Metropolitan Reply at 14.

306 Ad Hoc Reply at 9.

307 Pactel Comments at i; Pactel Reply at 5 n.11 (saying further delay would

says that if the LECs face less competition than AT&T, as is alleged by some parties, it would be more desirable to adopt such regulation for LECs immediately instead of postponing implementation until after completion of the price cap "experiment" with AT&T.[308]

188. Parties representing smaller and mid-size carriers urge this Commission to grant such LECs one or more opportunites beyond December 31, 1989, to depool and elect incentive regulation.[309] Claiming that depooling carriers would not have sufficient time or information to develop their price cap tariffs, PRTC and TUECA contend that a single entry date will limit the number of carriers able to operate under incentive regulation.[310] If this Commission does not permit eligible carriers to elect price caps after July 1, 1990, PRTC argues this Commission will, in effect, penalize those carriers for any delays and uncertainties in our own decision-making process.[311]

189. In addition to specific proposals for additional election dates, several of these parties also voice support for annual or other regular election dates.[312] OPASTCO suggests a "free-floating" election date that

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only serve to deprive consumers of the substantial savings that the new system of regulation would produce); GTOC Reply at 22 (agreeing with Pactel that further delay would harm consumers and asserting actual experience with price caps will "teach all of us more than an empire of hypotheticals"); SWB Reply at 27; USTA Reply at 2 (contending major concerns have been addressed and significant new issues have not been presented); US West Reply at 7.

308 SWB Reply at 26-27.

309 USTA Comments at ii, 19-20, 37-38 (contending carriers should be permitted to file as late as July 1, 1991); Illinois Telco Reply at 7; TUECA Comments at 6-7; Alltel Comments at 33 (asserting non-Tier 1 carriers would be unable to develop ARMIS-equivalent systems in the time available); OPASTCO Comments at i-ii, 5-6; Rochester Comments at 24 (proposing July 1, 1991, as a second election date); PRTC Comments at 18 (proposing January 1, 1991, as well as January 1, 1990, as election dates).

310 PRTC Comments at 17-18; TUECA Comments at 6-7, 18 (asserting that the benefits of increased participation outweigh administrative burdens of a late entry option); Ohio PUC Reply at 4-5; CBT Reply at 15.

311 PRTC Comments at 18.

312 TDS Reply at 12-13 (suggesting price cap elections at the time of each annual tariff filing); USTA Comments at ii, 19-20, 37-38; USTA Reply at 35-36 (arguing a July 1, 1990, election date plus annual elections will give carriers adequate time to make a balanced and informed decision); Alltel Comments at 5-6; OPASTCO Comments at 6-8; PRTC Comments at 18.

would presumably enable carriers to elect price cap regulation at any time during a given year.[313] OPASTCO challenges the Commission's contention that there would be data collection problems or other serious administrative burdens if there existed such a "free-floating" election date.[314] PRTC says this Commission should not be concerned about our ability to obtain sufficient information from late-entering companies for our comprehensive review. Since any carrier which enters price caps subsequent to the initial entry date would not have been likely to enter caps at all with a single entry date, additional entry dates will increase the data available for review, PRTC argues.[315] PRTC notes that while three years of data from a carrier are not as useful as four years, such a quantity of data is much better than none at all. Regarding the possibility of complications from the entry of late arrivals, PRTC submits that such problems are most likely to arise in the first year and that burdens will be significantly lighter for late arrivals.[316] USTA notes that, since carriers likely to use a second election date provide only a small percentage of the total access lines, their delayed participation would not adversely affect this Commission's ability to evaluate incentive regulation.[317]

190. Parties also submitted comments regarding whether LECs currently in the CCL or TS pools would be able to move directly to incentive regulation if they elected to depool on December 31, 1989. USTA said that the July 1, 1990, date would provide adequate time for pooling carriers to make the decisions necessary to initiate price cap regulation so long as this Commission released our order in a timely fashion.[318] On the other hand, PRTC contends that if carriers were required to enter incentive regulation on the schedule proposed in the Second Further Notice, they would have insufficient experience with depooled rates prior to filing their first price cap tariffs. Carriers that elected to depool on December 31, 1989, would find themselves filing their first depooled access tariffs under incentive regulation in April, 1990, without the opportunity to test depooled rates in the marketplace.[319] According to PRTC, adding the uncertainties of new,

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313 OPASTCO Comments at i-ii.

314 Id. at 6-8.

315 PRTC Reply at 15 n.8.

316 PRTC Comments at 16.

317 USTA Comments at 20.

318 Id. at 18-19.

319 PRTC Comments at 11, 17-18. See also TUECA Comments at 6-7, 18.

depooled rates to the risks of price caps would essentially eliminate any incentive to depool.[320] PRTC therefore argues that the proposed single entry date erodes this Commission's policy in favor of depooling and also increases the costs of Long Term Support to depooled carriers.[321] According to PRTC, depooled carriers will need adequate time to operate under rate of return regulation before entering price caps. If they do not get that time, PRTC asserts, these carriers are likely to remain in the pool or to exit the pool and operate under rate of return.[322] PRTC also questions how a price cap tariff can be constructed by this Commission from pooled, rate of return data. In addition, PRTC challenges this Commission's proposed involvement in the establishment of price cap tariffs by arguing that the Communications Act requires carrier-initiated rates. PRTC also claims that it is the carriers which will bear the losses if the confidence displayed by this Commission proves to be unfounded.[323]

3. Discussion

191. In proposing a July 1, 1990, implementation date, the Commission selected the earliest practicable date for initiating price cap regulation for LECs, consistent with the need to resolve a number of outstanding issues pertinent to applying incentive regulation to the local exchange industry.[324] The Commission noted that the Second Further Notice proposed modifications to the price cap plan adopted for AT&T, and that the proposed modifications were an attempt to resolve the remaining implementation issues. Based upon our review of the record received in response to the Second Further Notice, we have determined to seek additional comment in this Supplemental Notice on several issues. Additional comment is necessary for several reasons. First, the Supplemental Notice provides us with an opportunity to introduce new productivity evidence into the record. Second, we are in some cases proposing modifications to the LEC price cap plan that would benefit from comment by interested parties. These modifications, such as the proposal to prescribe a zone of reasonableness for carrier earnings, grew out of our analysis of the pleadings received in response to the Second Further Notice. Finally, we believe that our ability to adopt a set of final price cap rules for LECs would be enhanced by supplementing the record on a few key issues.

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320 PRTC Comments at 11-12.

321 Id. at 12-13.

322 Id. at 17.

323 Id. at 13.

324 Second Further Notice, 4 FCC Rcd at 3184 (para. 639).

192. The decision to go forward with this Supplemental Notice, however, necessitates a short delay of the proposed implementation date. The time required by interested parties to analyze and comment on the tentative decisions in this Supplemental Notice renders impossible the adoption of a final set of price cap rules in time for price cap tariffs to be filed for rates effective July 1, 1990. Furthermore, since the proposed change in regulation of the LECs must be carefully designed to confer public interest benefits, the proposed implementation date should be scheduled so as to permit a full and complete examination of the record received in response to this Supplemental Notice. As a result of the pleading cycle we establish in this Notice, we do not anticipate being able to consider a final set of LEC price cap rules before July 1, 1990, much less provide LECs sufficient time to prepare and file their first price cap access tariffs prior to that date.

193. The earliest date that now appears practicable for the implementation of LEC price cap regulation is January 1, 1991. This date provides sufficient time for all interested parties to consider and comment on the issues raised in this Supplemental Notice, for us to review those comments and reach decisions on the many issues presented, and for us to issue final rules in sufficient time for LECs to file their first price cap tariffs. We continue to be interested in implementing LEC incentive regulation as soon as possible. However, our interest in prompt implementation is not related to any perceived threat of LEC bypass by AT&T or to concerns about the LECs' ability to meet emerging competition. Rather, we want to move ahead as quickly as possible because incentive regulation provides so many more benefits for consumers than the current rate of return system.

194. We also want to make clear that we are not delaying incentive regulation for the LECs to review the results of such regulation of AT&T, to enable further competition to develop for the LECs, or to enhance our administrative resources, as some parties suggest we must. The record to date does not demonstrate that any of these matters justifies further delay. The six-month deferral is simply the minimum period necessary for us to complete the remaining work to be done in the current phase of this important proceeding.

195. In view of the brief duration of the deferral, we do not believe it would be beneficial to implement mandatory incentive regulation for some eligible LECs on an interim basis pending development of a plan applicable to all LECs. Also, in view of our need for additional information in a number of key areas, we are uncertain what form such interim regulation would take even if we were inclined to take that approach. Accordingly, we reject the suggestion that we adopt LEC incentive regulation on an interim basis. We also reject as moot the proposal that incentive regulation be adopted on an accelerated basis as of January 1, 1990. For depooled LECs eligible to elect incentive regulation but not required to participate in the price cap system, we seek comment on whether the proposed six-month delay in implementation would provide such LECs with sufficient experience outside

the National Exchange Carrier Association common line pool so that they would not need one or more additional election dates, as some have argued.

B. Reasonableness of Existing Rates

1. Summary of Tentative Findings

196. In the Second Further Notice, the Commission tentatively concluded regarding the LECs, that existing rates in effect prior to the commencement of price cap regulation, as previously developed under rate of return principles, would be the most reasonable basis for initial price cap index levels.[325] In particular, the Commission determined that the alternative of a comprehensive rate case prior to price cap regulation would not serve the public interest because such a proceeding would require use of a cost allocation methodology which the Commission had already found to be unrelated to economic efficiency and because it would cause delay outweighing any supposed benefits.[326] Nevertheless, the Commission said that some across-the-board rate cuts for LECs might be desirable because existing rates reflected decisions made under a regulatory regime which had encouraged inefficiency. The Commission concluded, however, that the record then before it provided an insufficent basis for such uniform rate cuts and invited further comments on the issue, including specification of the magnitude of such cuts and the legal and factual bases for them.[327]

197. In the Second Further Notice, the Commission also responded to arguments by several commenters that existing LEC rates should be adjusted downward before becoming the initial basis for price caps because many LECs had then current earned rates of return in excess of the authorized level.[328] The Commission noted that retargeting of these rates was being addressed in a separate proceeding and that it expected the LECs to be careful in targeting those rates to earn no more than the authorized level in the period prior to price cap implementation.[329] It then concluded that across-the-board cuts

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325 Second Further Notice, 4 FCC Rcd at 3248 (para. 772).

326 Id. at 3247 (para. 773).

327 Id. at 3247-48 (para. 774).

328 Id. at 3248 (para. 775). These proposed cuts were based on excessive earned rates of return, as distinguished from rate cuts based on cumulative inefficiencies from past rate of return regulation. Compare 4 FCC Rcd at 3247-48 (para. 774) with 4 FCC Rcd at 3248 (para. 775).

329 Id. The Commission was referring to an Order To Show Cause which the Bureau issued to the LECs on December 2, 1988, concerning retargeting of their access rates for the remaining 1989 balance of the January 1988 to March 1989 rate period. Local Exchange Carrier Access Tariff Rate Levels, CC Docket No. 88-554, 4 FCC Rcd 762 (Com.Car.Bur. 1988). The LECs' responses to this order

ere unjustified because LEC overearnings were not uniform over service categories. It further observed, however, that parties would continue to have the opportunity to challenge LEC rates through the complaint and tariff review processes and that it would continue to review those rates through the monitoring and performance review features of the price cap plan.[330] It also concluded that the Consumer Productivity Dividend would be better targeted to reflect anticipated productivity gains than an initial rate cut.[331]

198. In the Second Further Notice, the Commission also concluded that completion of all pending investigations of access rates would be unnecessary before implementation of price caps because any subsequent results of such investigations could be reflected in later price cap adjustments or in refunds.[332] It also noted that most of the comments on this matter concerned special access and that the results of the rate investigation ordered in the Strategic Pricing Order of December 1, 1988, would provide a reasonable point of departure for price caps.

199. Finally, in the Second Further Notice, the Commission proposed that the LECs set the initial values of the price cap index, actual price index, and service band index at 100, based on the rates and costs in effect on December 31, 1989. The Commission further proposed that any changes in rates or exogenous costs between that date and the date of the first annual LEC price cap tariffs -- then proposed to be July 1, 1990 -- be reflected in adjustments to those indexes.

2. Pleadings

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were addressed in a subsequent Bureau order released December 30, 1988. Local Exchange Carrier Access Tariff Rate Levels, 4 FCC Rcd 2168 (Com.Car.Bur. 1989). On January 5, 1990, the Bureau issued a similar Order To Show Cause to the LECs concerning their April 1989 to June 1990 access rates, which directed that any resulting adjustments were to become effective no later than February 15, 1990. Local Exchange Carrier Access Tariff Rate and Earnings Levels, CC Docket No. 90-1, 5 FCC Rcd 482 (Com.Car.Bur. 1990) (1990 Order To Show Cause). The LECs' responses to this order were addressed in a recent Bureau order released on February 15, 1990. Local Exchange Carrier Access Tariff Rate and Earnings Levels, CC Docket No. 90-1, DA 90-226 (Com.Car.Bur., released Feb. 15, 1990) (Response to 1990 Order To Show Cause).

330 Second Further Notice, 4 FCC Rcd at 3248 (para. 775).

331 Id. at 3249 (para. 777).

332 Id. at 3248-49 (para. 776).

200. The LECs generally support the Commission's tentative conclusion in the Second Further Notice that existing rates should be used to initiate price caps. The LECs contend that existing rates are reasonable primarily because those rates have already been scrutinized in the tariff review process and because neither the authorized LEC rate of return nor the level of recent LEC earnings is excessive. The LECs oppose an initial, across-the-board rate reduction chiefly because of their claim that it is unnecessary in light of the reasonableness of current rate levels. In addition, they argue that such a reduction would distort incentives to efficiency, would require a full hearing, and would achieve less than the Consumer Productivity Dividend. Finally, the LECs oppose a comprehensive rate investigation prior to price caps largely because it is unnecessary in light of reasonable current rate levels and because the delay and administrative burden of a full hearing would outweigh any likely benefits from resulting rate adjustments. Large users and various other parties oppose the Commission's tentative conclusions and the foregoing LEC positions on almost every point.

a. Reasonableness of existing rates

201. Several commenters argue that because existing rates are too high in the sense that they reflect past disincentives to efficiency, as the Second Further Notice acknowledged,[333] the use of existing rates as the initial basis for price caps simply perpetuates those disincentives. For example, Ad Hoc contends that it is contradictory for the Commission to recognize the consumer harm built into existing rates by these disincentives while at the same time claiming that price caps based on these rates would result in immediate consumer benefits.[334] Similarly, MCI charges that the Commission does not explain "how an inadequate system of regulation which has caused cross-subsidies, rate base padding and inefficiencies has somehow produced rates that are not excessive."[335]

202. In contrast, Ameritech and SWB claim that rate of return regulation has in fact provided substantial incentives for efficiency in the recent past which, though not as powerful as the incentives under price caps, have nonetheless operated effectively to discourage inefficient practices. In particular, these LECs note that the BOCs' average earned rate of return has

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333 Id. at 3248 (para. 774).

334 Ad Hoc Comments at 30-31.

335 MCI Reply at 27-28. See also Iowa Comments at 11; NARUC Reply at 9-10; TCA Comments at 11; Maryland PC Comments at 2.

been under the authorized maximum for 14 of the last 15 years and that this margin has provided an abiding motivation for significant cost control.[336]

203. A number of LECs maintain that existing rates are reasonable because they have already been subject to scrutiny by opposing parties and the Commission in the tariff review process, as well as in other oversight and monitoring activities.[337] GTOC states unqualifiedly that current rates "at the start of price caps will have already satisfied the 'just and reasonable rates standard.'"[338]

204. Many commenters clash over the reasonableness of the current authorized rate of return and recent LEC earnings. According to MCI, the present allowable rate of return is too high in view of declining interest rates and the lower earned returns on equity of firms in the private sector whose operations are riskier than the LECs.[339] Ad Hoc claims that existing rates are simply too high even apart from the lesser competition which the LECs face compared to AT&T, and apart from the Commission's understatement of LEC historical productivity.[340] Both MCI and Ad Hoc observe that a recent NARUC study of independent LEC rates of return for 1972 to 1987 showed higher returns than more risky private firms.[341]

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336 Ameritech Comments at 8-9; SWB Comments at 43-44.

337 Bell Atlantic Comments at 14-16; Pactel Comments at 18; Centel Reply at 19; Rochester Comments at 2; USTA Reply at 29-30. SWB argues that language in the Second Further Notice concerning the initialization of indexes should be clarified to ensure rates remain reasonable in the period immediately preceding implementation of price caps. SWB argues that any exogenous cost factors that occur between the date indexes are initiated and the date price cap regulation is implemented should be applied to all three of the proposed indexes, not just the Price Cap Index. SWB Comments at 36-37. See also Allnet Comments at 5.

338 GTOC Comments at 17. But see Rochester Reply at 14 (allowing rates to become effective does not constitute the Commission's imprimatur that they are reasonable, although existing rates have been subject to significant contested proceedings).

339 MCI Comments at 44-45. See also TCA Comments at 11 (stating that one of the reasons existing rates are too high is the lack of enforcement of the prescribed target return).

340 Ad Hoc Comments at 30-31.

341 MCI Comments at 44 n.81; Ad Hoc Comments at 5-6, 31-32. Pactel replies that the NARUC study explicitly stated that its conclusions did not suggest that any of these LECs either overearned or underearned and that only a

205. Pactel responds to Ad Hoc and MCI by pointing out that when the Commission deferred represcription of the outstanding LEC rate of return on March 24, 1988, in the ongoing rate of return proceeding in Docket 87-463, it formally concluded that continuation of the standing 12 percent rate of return was reasonable.[342] In light of the Commission's determination that a 12 percent target rate of return is reasonable, Pactel and Ameritech state that they support retargeting LEC rates of return to the authorized level before those rates become the foundation for price caps. Ameritech argues that retargeting "works two ways," so that a set of rates producing earnings less than 12 percent would increase, while rates producing overearnings would decrease.[343]

206. Ameritech contends that pending rate investigations present little problem regarding the reasonableness of existing rates because, as the Second Further Notice tentatively concluded,[344] any ensuing findings in these cases can be reflected later as exogenous variables in the price cap formula.[345] Similarly, Pactel argues that this Commission can establish procedures for adjusting rates prospectively if we later conclude that specific rates should be revised.[346] Ad Hoc asserts, however, that until this Commission concludes various ongoing investigations of LEC pricing abuses with affirmative findings on the merits, we cannot establish just and reasonable price caps. Moreover, Ad Hoc says, there must be defined standards for factoring in such changes to prevent the LECs from "gaming the process."[347] Several other large users and related parties concur with Ad

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thorough examination of the kind made in a state rate investigation could properly determine if LECs did overearn. Pactel Reply at 67-70. PRTC and SWB add that the NARUC study excluded the BOCs, included intrastate and nonregulated businesses, and did not focus on current rates. SWB Reply at 41-44; PRTC Reply at 32-33.

342 Pactel Reply at 68-69 (citing Refinement of Procedures and Methodologies for Represcribing Rates of Return for AT&T Communications and Local Exchange Carriers, Memorandum Opinion and Order, 3 FCC Rcd 1697 (1988)).

343 Pactel Comments at 17-18; Ameritech Comments at 6.

344 See Second Further Notice, 4 FCC Rcd at 3248-49 (para. 776).

345 Ameritech Comments at 7.

346 Pactel Comments at 15-16.

347 Ad Hoc Comments at 32-33.

Hoc, primarily concerning what they consider to be excessive rate levels and strategically priced rate structures in special access.[348]

b. Comprehensive rate case

207. Several LECs oppose a new, comprehensive rate investigation to determine the proper base for price caps on the ground that the administrative burden and delay involved would outweigh the likely benefits from any resulting adjustments to existing rates.[349] For example, PRTC argues that a new rate case would delay price caps with no guarantee of lower prices, would be unnecessary given that the BOCs underearned in 14 of the last 15 years, and would strain this Commission's resources. PRTC also claims that the Consumer Productivity Dividend would probably produce more rate reductions than a two- or three-year rate case would, in addition to reductions from market forces.[350] Illinois supports the LECs on this point, stating that the rate of return approach cannot establish appropriate rates, that serious legal questions would probably require separate rate investigations for each company, and that such investigations would delay price cap implementation and entail regulatory costs which outweigh any benefits.[351]

208. On the other hand, MCI argues that a general rate case is needed to set the stage for price caps by resolving various outstanding issues concerning the justness and reasonableness of existing rates.[352] Similarly, TCA asserts that this Commission's haste in avoiding a time-consuming general rate investigation may seriously injure users because of excessive rate

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348 LOCATE Reply at 8-9; Metropolitan Comments at 29-31; NAB Reply at 3-7; NY Clearinghouse Reply at 12-14; Networks Comments at 4-7; TCA Comments at 11. We will not address these comments in this section of the instant Supplemental Notice for two reasons: first, most of the arguments were based on assumptions which are now mooted by this Commission's release on January 19, 1990, of the Strategic Pricing Reconsideration Order, Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Order on Reconsideration (released Jan. 19, 1990); second, the wider topic of flexible pricing under price caps is addressed in Section VI of this Notice.

349 Pactel Comments at 5; SNET Reply at 9; United Comments at 7; USTA Reply at 29-30.

350 PRTC Reply at 34-37.

351 Illinois Reply at 15.

352 MCI Comments at 45-46.

levels.[353] Iowa suggests that, in light of the Commission's findings in this proceeding that rate of return regulation yields defective rates, such as the failure of such regulation to provide guidance in allocating common costs, it should conduct a comprehensive rate case for each company, even though such a proceeding would be administratively burdensome.[354]

c. Initial across-the-board rate reductions

209. The LECs oppose an initial across-the-board rate reduction as unnecessary for the same reasons they cite in arguing for the reasonableness of existing rates. In addition, the LECs argue that: (1) imposition of the rate cut would have to comply with various procedural requisites under the Communications Act; (2) such a rate cut would decrease their available earnings at a critical time in the transition to price caps; and (3) there are other mechanisms and safeguards in the price cap plan which would achieve the same goal more effectively.

210. Ameritech argues that an across-the-board rate cut would require a full prescription hearing pursuant to Section 205 of the Communications Act and that this Commission would have the burden of proving that existing rates are not just and reasonable and that the proposed reduced rates are.[355] Further, Ameritech contends that the proceeding would likely fail to produce any support for disallowances because there is no evidence that Ameritech's operating expenses and capital expenditures have been imprudent.[356] Similarly, SNET argues that no one in this proceeding has suggested a realistic or practical method for an across-the-board rate reduction.[357]

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353 TCA Comments at 10.

354 Iowa Comments at 11. In addition to the foregoing, Ad Hoc argues that prior to establishing the LEC price cap plan, this Commission must conduct a full prescription proceeding pursuant to Section 205 of the Communications Act because the plan would establish a demarcation between presumptively lawful and unlawful rates. Ad Hoc Comments at 35-38. Although this argument touches on the present topic, it is more pertinent for purposes of the instant Supplemental Notice to the discussion of prescription of the automatic stabilizer and therefore has been discussed in Section III.

355 Ameritech Comments at 10-12. See also University Comments at 2 (a uniform reduction is unquantifiable and speculative); Centel Reply at 16-17; USTA Reply at 30-31; Illinois Reply at 15.

356 Ameritech Comments at 11-12.

357 SNET Reply at 9.

211. Several LECs claim that the abrupt decrease in available earnings resulting from a uniform rate cut would increase the LECs' financial risk and would deprive them of the means and opportunity to finance efficiency producing investments.[358] SNET also maintains that a uniform reduction would skew LEC incentives because the capital intensive nature of LEC operations means that efficiency-enhancing initiatives take time to yield benefits. Similarly, Centel states that earnings reductions could affect funds available for developing new services.[359]

212. Many LECs contend that an initial across-the-board rate cut is unnecessary because there are other mechanisms and safeguards in the price cap plan which compensate for the legacy of past inefficiencies in existing rates. For example, GTOC mentions the historical productivity factor, the Consumer Productivity Dividend, and the automatic stabilizer, as well as existing tariff review procedures.[360] Moreover, several LECs agree with the tentative finding in the Second Further Notice that the Consumer Productivity Dividend is better targeted to reflect anticipated productivity gains than an initial rate cut would be.[361] According to Illinois, an even more aggressive Consumer Productivity Dividend than 0.5 percent would be of greater effectiveness in the initial years of price caps.[362]

213. Several non-LEC parties support an initial across-the-board rate cut. MCI argues that a cut is justified because the applicable 12 percent rate of return is excessive in view of declining interest rates, the recent earnings experience of comparable firms, and other factors.[363] Ad Hoc charges that the Commission mistakenly perceives the problem as insufficient support for a rate cut, whereas the real problem is insufficient support for use of the excessively high existing rates. Ad Hoc further claims that use of these inflated existing rates is unreasonable notwithstanding what future productivity might result and notwithstanding the delay which might be

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358 Bell Atlantic Comments at 14-16; Centel Comments at 16-17; SNET Comments at 13; USTA Reply at 30-31.

359 Centel Reply at 16-17.

360 GTOC Comments at 16-19.

361 Bell Atlantic Reply at 21-22; Pactel Comments at 19; SWB Reply at 44-45; Centel Reply at 18-19; Rochester Reply at 14-16.

362 Illinois Reply at 15-16.

363 MCI Comments at 44-45. See also NY Clearinghouse Comments at 17-18.

necessary to make a more reasonable decision on initial index levels.[364] ICA asserts that the Commission's conclusion that there is insufficient support for an across-the-board rate cut misplaces the burden of proof on ratepayers, while it is the LECs themselves who have access to the relevant data.[365] In contrast, Illinois opposes an across-the-board cut, stating that, in the absence of a comprehensive rate case for each carrier, there would be little foundation for an initial downward adjustment because existing rates have been deemed just and reasonable.[366]

214. Finally, SBA recommends an alternative to an across-the-board rate reduction in which this Commission would base the price cap index on the rates of the lowest priced LEC, after adjustments for the cost of living and local loop costs. SBA further suggests that this Commission make this approach elective, waiving the Consumer Productivity Dividend for LECs that voluntarily participate in it.[367]

3. Discussion

215. We reaffirm the tentative conclusion in the Second Further Notice that current LEC rates, in existence when price caps are implemented, constitute the most reasonable basis for initiating LEC price caps. We reach this tentative conclusion primarily because these rates will have already been subject to a degree of scrutiny under rate of return regulation in the annual 1990 access tariff filings which is adequate for the limited purpose of initializing price caps indexes. We also tentatively find, as in the Second Further Notice, that a comprehensive rate case, in the sense of an extraordinary proceeding expressly to set the stage for price caps, is not warranted because the administrative burden and delay involved would outweigh any public interest benefits, particularly since these rates will have just been examined in the normal tariff review process. We further tentatively conclude that the indexes used to establish price caps should be initialized at 100 based on existing rates as of July 1, 1990, for price caps to become effective on January 1, 1991.

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364 Ad Hoc Comments at 30-31.

365 ICA Comments at 5-6. See also SBA Comments at 36 (objecting to the Commission's requirement that commenters provide data on embedded cost inefficiencies because this Commission has the data and should be able to determine these inefficiencies itself without a full-scale rate investigation).

366 Illinois Reply at 15.

367 SBA Comments at 36-37. See also Allnet Comments at 5.

216. We also tentatively propose that the indexes in the price cap plan be adjusted for certain extraordinary, non-recurring exogenous cost changes which may occur during the period from our proposed price cap base date of July 1, 1990, through our proposed price cap effective date of January 1, 1991, and which will affect the reasonableness of existing rates. We specifically propose to treat as exogenous, and therefore incorporate into existing rates under our price cap plan, the represcription of the unitary LEC rate of return which will be established in the pending comprehensive rate of return represcription proceeding. We seek comment on whether mid-course filings for under-earnings or over-earnings effective after July 1, 1990, and before January 1, 1991, should be treated as exogenous adjustments to price cap index levels, thereby affecting initial price cap rates.

217. Moreover, we tentatively conclude that since the first LEC price cap filing will occur in the middle of what would have been an annual access year, LECs should revert as soon as possible to the July 1 annual tariff schedule the Commission previously established.[368] Finally, we seek additional comment on the proposal in the Second Further Notice for an across-the-board rate cut to "squeeze out" inefficiencies in rates that have accrued under rate of return regulation.

a. Reasonableness of Existing Rates

218. We reaffirm the central tentative conclusion in the Second Further Notice that the LECs' existing rates at the time of price cap implementation can be expected to fall within a zone of reasonableness for the purpose of initializing price caps. These rates will have already withstood scrutiny in the 1990 annual access tariff review process, as well as in other Commission oversight and monitoring activities. Although there may be some other outstanding proceedings concerning these rates which have not yet been completely resolved, these rates are basically settled. Moreover, these rates will reflect not only the most recent annual 1990 access proceeding, but also the entire course of development and refinement of the Commission's access charge system over the past several years.

219. We recognize that the rate of return regime which has produced these rates suffers from limitations, and it is precisely these limitations which we are seeking to remedy in the instant proceeding.[369] This does not mean, however, that the entire system of rates which the latter has engendered is devoid of economic rationality. Our tentative view is that, on an industry-wide basis, existing rates are producing results consistent with

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368 Access Tariff Filing Schedules, 3 FCC Rcd 5495 (1988) (Access Deferral Order).

369 See generally Section II, infra.

good rate of return practices. We have criticized rate of return cost allocation methods and earnings limitations as producing inefficient rates in comparison to an incentive-based system. All we can ask of ourselves and the industry in preparing initial rates for a new regulatory regime, however, is that the existing rates reasonably reflect our existing regulatory structure and our method of determining just and reasonable rates, both of which have been upheld many times in the past.

220. Furthermore, the present purpose for which we are assessing the reasonableness of existing LEC rates is a narrow and limited one. It is simply to provide a suitable point of departure from which price cap incentives can begin to induce greater efficiency and innovation, ultimately driving LEC rates and costs to an economically optimum range. Even in the relatively short run, it is the direction and dynamic of this process, as much as the starting point, which is important. Moreover, during the brief initial period as these forces begin to produce significant consumer benefits, the Consumer Productivity Dividend already will have afforded immediate and substantial consumer benefits.

221. Some parties might argue that we should have cancelled, postponed, truncated, or otherwise altered the scheduled annual 1990 access tariff filing because the impending LEC price cap plan invites LECs to "game" their rates. The annual 1990 access filing has long been scheduled under the Access Deferral Order. The Bureau's recent Tariff Review Plan Order provides LECs with specific directions that dictate the format and content of the cost support materials they file. Use of such a standardized format, as well as our extensive experience with reviewing annual access filings, will enable us to guard against LEC attempts to pad their costs unnecessarily.

222. In addition, the 1990 filing is, in a sense, the culmination of the entire series orders in which we have developed the access charge system. On an industry-wide basis, we have had extensive experience in administering and fine-tuning this rate system. The particular set of existing rates on which we are focusing here, i.e., those to be in effect on July 1, 1990, will be a product of this development.[370] Although the instant

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370 The main points in the procedural history of these rates are as follows: In 1988, the Commission released the Access Tariff Filing Schedules, 3 FCC Rcd 5495 (1988) (Access Deferral Order), which shifted annual access tariff filings from a January-December rate period to a July-June rate period. This Order also established two transitional 15-month access periods to synchronize the shift: January 1, 1988, through March 31, 1989; and April 1, 1989, through June 30, 1990. Our current rates at the anticipated implementation of price caps, which we are here tentatively proposing as the basis for initializing those price caps, will be the annual 1990 access tariffs, i.e., the product of the first normal 12-month annual access filing after this transition, effective July 1, 1990. The standing rate of return applicable to these rates

price cap proceeding represents our effort to replace the present access rate system, we do not see sufficient reason to abort its long scheduled process now. In our review of the 1990 access tariff filings, we intend to fully scrutinize the LECs' proposed rates, and this close examination will enable us to determine whether they are a reasonable starting point for price caps.

223. We reaffirm, however, the tentative conclusion in the Second Further Notice that there should not be a comprehensive rate investigation prior to price caps in the sense of an extraordinary examination of each LECs' rates, comparable to a state rate case, to set the stage for price caps. Such a full general rate case would result in extensive delay and administrative burden. Moreover, it would be unnecessary because existing rates on July 1, 1990, will be the product of full initial tariff review, conducted under established procedures, in the annual 1990 access tariff proceeding. In addition, should we choose to investigate any of these rates upon complaint or our own motion, we can make any necessary adjustments at the conclusion of the investigations.

b. Initialization of the Indexes

224. Given our tentative determination that existing rates are a reasonable starting point for price caps, we tentatively propose that the base date for initializing indexes in the LEC price cap plan should be July 1, 1990. Although that date is in the future and thereby subject to possible "gaming" by the parties, it will reflect a set of rates that more closely matches the LECs' costs at the time price caps begins. In view of the scrutiny which we intend to focus on the LECs' 1990 Tariff Review Plan cost support data, we believe this July 1, 1990, date strikes the proper balance between the benefit of cost submissions which accurately reflect current conditions and the possibility that LECs could use the period between the release of this Notice and the inauguration of price caps to inflate costs and rates.

c. Adjustments to Existing Rates During 1990

225. We have tentatively decided that industry rates which will be current at the implementation of price caps have the indicia of reasonableness necessary to commence price cap regulation. We have also tentatively selected a date, July 1, 1990, that reflects a balance between the timliness of such existing rates and the danger that LECs will manipulate those rates to give themselves an advantage under a price cap plan. We now discuss how to ensure that these rates, which we anticipate today will be generally reasonable as of July 1, 1990, might be adjusted between that

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will be 12 percent, until such time as there is a full represcription. See Interim Represcription Order, 5 FCC Rcd 197 (1989).

effective date and January 1, 1991, if circumstances calling for such adjustments arise. These circumstances would include, for example, a change in the current rate of return represcription or inappropriate LEC earnings levels, as indicated by mid-course filings or our own ongoing monitoring. Consistent with the price cap formulas we are proposing, we tentatively find that adjustments to July 1, 1990, rates stemming from rate of return and earnings adjustments should take the form of one time exogenous cost factors that are applied to the price cap index (PCI).

226. The major instance which we foresee of such possible exogenous adjustments to PCI levels would follow from rate of return represcription in the current proceeding for LEC rate of return. On December 29, 1989, this Commission released the Interim Represcription Order,[371] which evaluated various industry and comparable firm data to determine, on an interim basis, what the target rate of return should be in the period leading up to a full Part 65 represcription. Based on the data collected, this Commission decided that the existing earnings target of 12 percent should be retained on an interim basis, effective January 1, 1990. We stated that the record in this truncated interim proceeding was sufficient for us to determine that a 12 percent rate of return was within the range of reasonableness pending completion of the full represcription.[372] As part of our Order, we also initiated a comprehensive represcription proceeding under Part 65 of this Commission's Rules. We further stated that we expected the comprehensive represcription to be completed by the fall of 1990.[373]

227. This ongoing rate of return represcription proceeding may conclude with the selection of a target rate of return that is different from the existing 12 percent target. Given that the current 12 percent target is the result of an abbreviated process, and that the Commission's last full-scale rate of return process occurred in 1986, we tentatively conclude that if the represcription process now underway results in a target different from 12 percent, the difference should be reflected in a one-time exogenous cost adjustment to LEC price cap index (PCI) levels. We reach this tentative decision based on the belief that this Commission's internal administrative

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371 Interim Represcription Order, 5 FCC Rcd 197 (1989).

372 Id. at paras. 45-47.

373 Id. at paras. 46, 49. We also stated that the full represcription under the present Part 65 Rules would serve the public interest even though it would not reflect possible refinements under consideration in the pending rulemaking to refine those rules. Id. at para. 49, citing Refinement of Procedures and Methodologies for Represcribing Interstate Rates of Return for AT&T Communications and Local Exchange Carriers, CC Docket 87-463, Notice of Proposed Rulemaking, 2 FCC Rcd 6491 (1987).

decisions about the timing of final decisions in our docketed proceedings should not affect the launch of a price cap plan for LECs. For example, had we been in a position to conclude a full-scale represcription earlier, there would have been no question that its effects would have been felt in the existing set of rates on which we based the indexes. We therefore tentatively propose to treat the effects of our Part 65 represcription decision as an exogenous adjustment to PCI levels. If, as we expect, the represcription is completed prior to the implementation of price caps, we propose that the adjustment shall be included as one of the set of exogenous adjustments to PCI levels occuring on January 1, 1991. If for some reason the represcription decision is made later, we propose that the exogenous adjustment to LEC PCIs will be made on the same day that rate of return carriers must factor into their rates the effects of the represcription.

228. Another possible type of change occurring between the price cap initialization date of July 1, 1990, and the price cap effective date of January 1, 1991, concerns evidence of over-earnings and under-earnings, to the limited extent such data will be available by January 1, 1991. We note that several companies, in response to a Bureau Order to Show Cause in this regard concerning the annual 1989 access rates, filed midcourse corrections to revise their rates downward, and that the Bureau later took action with respect to several other companies with apparent over-earnings.[374] Similarly, it is possible that during 1990 we will receive midcourse corrections from companies that are underearning. We tentatively find that midcourse corrections which are effective prior to the proposed October 1, 1990 price cap filing date, and that simply remedy over-or under-earning situations, should be the basis for a PCI adjustment.

229. We tentatively elect to incorporate possible earnings adjustments into PCI levels as exogenous adjustments because an adjustment to the PCI is the best technical means of ensuring that LECs' actual rates reflect suitable earnings levels once price cap regulation is initiated. Once the PCIs are initiated at 100, they move only in recognition of exogenous costs and in response to annual updates in the inflation-less-productivity factors. Thus, a LEC who retargets rates downward during 1990 in response to an overearnings situation would, under our proposal, also decrease its PCI to reflect the rate decrease. The revised PCI becomes the basis for the January 1, 1991 caps; at its new, lower level, it becomes the basis upon which the annual PCI adjustments for inflation and productivity are made. Since our proposed price cap rules stipulate that actual aggregate prices (as measured by the actual price index) can never exceed the PCI, actual prices would reflect the earnings adjustment.

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374 See 1990 Order To Show Cause, supra; Response to 1990 Order To Show Cause, supra.

d. Other Index Issues

230. We also seek comment on a proposal to treat the initial price cap filing, effective January 1, 1991, differently from an annual price cap filing. As proposed in our rules, the annual price cap filing contemplates applying an adjustment to PCI levels for inflation and productivity. The adjustment would take place once a year. The initial price cap filing proposed in this Notice would be filed in the middle of a July to June access year. Since price cap regulation is based on annual updates to the price cap formula, we tentatively find the best means of returning to the July 1 schedule is to treat the first filing as a six-month filing. Furthermore, because we will have just completed an annual review of carrier access rates that adjusts on a prospective test year basis for changes in costs, we propose not to calculate adjustments for inflation and productivity in the initial filing. The full, annual adjustments for inflation and productivity would then be taken in LEC tariffs effective July 1, 1991.

e. Upfront Rate Cuts

231. One of our fundamental conclusions throughout this proceeding has been that rate of return regulation has long created opportunities for inefficient decisions in carriers' provision of telecommunications services. This may have resulted in rates which are too high in the sense that they reflect decisions influenced by these distorted regulatory incentives. Given that the Consumer Productivity Dividend is designed to begin to squeeze out some of these inefficiencies at the time price caps is initiated, we seek comment on whether we should accelerate that process. If the record in response to this Notice provides a basis for an upfront cut, one possible mechanism commenters should explore is to take the full Consumer Productivity Dividend initially, instead of half of it as we propose.

V. PRICING FLEXIBILITY

A. Summary of Tentative Findings

232. In the Second Further Notice, the Commission found that pricing flexibility is an important ingredient for ensuring that price cap regulation produces economic benefits.[375] In support of its finding, the Commission cited a study that found the consumer welfare loss resulting from rate of return regulation of telephone companies to be approximately $1 billion annually.[376] The Second Further Notice found that by enabling carriers to move away from a set of prices based on fully distributed costing principles, carriers could migrate toward a more economically efficient set of prices.[377]

233. Rather than grant LECs the unfettered discretion to reprice their services to attain greater efficiencies, the Commission proposed to limit, but not foreclose, the LECs' ability to migrate prices away from those based on rate of return principles, and toward a more efficiency-enhancing set of prices.[378] The Second Further Notice therefore includes proposals: (1) to establish separate baskets for common line, traffic sensitive, and special access: (2) to create within the traffic sensitive basket, service categories based on Part 69 access elements; (3) to create within the special access basket, service categories for nine special access services plus a tenth for interexchange service; and (4) to grant streamlined tariff filing treatment only to rate changes that amount to no more than a 5 percent increase or decrease in aggregate prices in each service category, a proposal the Commission termed "rate banding."[379] The Commission stated that these proposals would allow LECs to move prices toward more efficient levels on an incremental basis, thereby preventing rate "shock" that might otherwise occur if LECs had complete freedom to formulate service prices.

B. Pleadings

234. A number of parties focus on whether the pricing flexibility built into the price cap system would lead to anticompetitive pricing actions against the emerging special access competitors or particular groups of

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375 Second Further Notice, 4 FCC Rcd at 2924 (para. 105).

376 Id. at 2924-25 (para. 106).

377 Id. at 2924 (para. 105).

378 See id. at 3235-40 (paras. 751-759).

379 Id.

customers. Many commenters argue that the lack of competition for access services, coupled with the pricing flexibility built into the price cap plan, will result in the LECs cross-subsidizing certain services at the expense of others.[380] MCI argues that the economic models the Commission used to support its tentative conclusions regarding price caps demonstrate that economic pricing will not result from the proposed plan.[381] Others cite the LECs' history of strategic pricing for special access,[382] and argue that the price cap proposal will simply enable LECs to discriminate among customers.[383]

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380 Ohio PUC Comments at 1-2 (lack of competition for access will allow LECs to shift rate burdens to residential and small business users); Ohio PUC Reply at ii, 1-2, 7; NARUC Reply at 1; Hawaii Reply at 2; Metropolitan Comments at 6-8 (LECs will subsidize their more competitive services with revenues from their less competitive services); NCTA Reply at ii, 2, 26-28; SBA Comments at 8 n.7 (arguing that LECs might also subsidize a nonregulated activity). But see USTA Reply at 10-11 (baskets and bands prevent cross-subsidy); Centel Reply at 4-5 (competition will prevent cross-subsidy, and sufficient safeguards have been built into the proposal as additional preventative measures).

381 MCI cites several studies the Commission used to support price cap regulation, arguing that the plan proposed for the LECs fails to conform to the criteria for successful incentive regulation. MCI cites the study by T. Brennan, "Regulating by 'Capping' Prices," Economic Analysis Group Discussion Paper, U.S. Department of Justice, Sept. 16, 1988, arguing that Brennan's study shows consumer welfare gains only for marginal price adjustments, and only if the net average of price changes weighted by output is dropping. MCI also cites I. Vogelsang, "Price Cap Regulation of Telecommunications Services: A Long-Run Approach," Rand, Feb. 1988, finding that consumer benefits will accrue only if reexaminations of profits occur after five to ten years. MCI also cites a study by L. Johnson, "Price Caps in Telecommunications Regulatory Reform," Rand, Jan. 1989, for the proposition that price cap regulated monopolies continue to have an incentive to cross subsidize between services. MCI Comments at 56-57.

382 Id. at 54-56. MCI argues that the only theory that supports a view that access prices will become more economically efficient is the theory of contestable markets. MCI states, however, that in order for the "Ramsey pricing" effect to produce a net gain in consumer welfare, there must be a significant threat of entry by a firm that would not need to make substantial, non-recoverable investment if it is subsequently forced out of the market. Since LECs face virtually no competition for access services, the theory of contestable markets is inapplicable, MCI argues. MCI states that, as a result, LECs will simply exert monopoly control over various market segments.

383 Id. at 21-26 (LECs could use special contracts or discriminatory tariff structures to target rate reductions to particular customers); MCI Reply at 1-

LEC competitors argue that the pricing flexibility built into the price cap plan will enable LECs to block the growth of competition for access services.[384] Metropolitan argues this Commission should not use price caps to deviate from its long history of fostering pro-competitive policies, in view of the LECs' lengthy history of willingness to engage in anticompetitive behavior.[385] Commenters argue that the development of competition for access services requires cost-based pricing by LECs.[386]

2; Allnet Comments at 1-4; IIA Comments at 1-2.

384 Local Telecomm Comments at ii-iii, 5-7, 12-13 (further "tinkering" with price caps is analogous to rearranging the deck chairs on the Titanic; public policy should focus on the development of a strong access industry); Local Telecomm Reply at 2-6; Metropolitan Comments at 3-5, 17-22 (price cap regulation provides "virtually unfettered" pricing discretion that will "chill" investment in competitive access providers); MCI Reply at 8-10; NCTA Reply at ii, 2, 26-28 (tying arrangements between competitive and monopoly services will exist, and excessive cash flows will be used to subsidize LEC entry into cable markets).

385 Metropolitan Comments at 6-17; Metropolitan Reply at 6-11 (describing how tariff streamlining, the standards of review for nonstreamlined tariffs, baskets, bands, and the existing complaint process give LECs "carte blanche" to engage in anticompetitive behavior). Accord LOCATE Comments at 3-6; LOCATE Reply at 3-5 (the existence of broad pricing bands, coupled with the Strategic Pricing Order, and the proposed rules for new services gives LECs unfettered pricing discretion). But see Ameritech Reply at 8-9 (explaining, in light of one example cited by Metropolitan, that Wisconsin Bell's proposal to lower high capacity service rates for one central office serving area reflects the lower costs of serving a highly concentrated area, as well as the existence of competitive alternatives).

386 IIA Comments at 1-2 (arguing that cost-based pricing is particularly important with respect to Open Network Architecture); Allnet Comments at 1-4 (arguing that the stabilizer represents an admission that price caps cannot control profits). But see SWB Reply at 25 (Allnet's argument is incorrect since price cap regulation limits a carrier's ability to recoup lost profits during the period of predation). Local Telecomm urges this Commission to convene a regulatory summit to address whether access services should be provided in either a monopolistic or competitive setting. Only after a broad-based policy determination would Local Telecomm argue that changes to existing regulation be undertaken. Local Telecomm Comments at i-ii, 3-5; Local Telecomm Reply at 6-7. Accord LOCATE Reply at 5. But see Centel Reply at 15 (sufficient safeguards are in place to protect consumers); PRTC Reply at 8-9 (proposal for a regulatory conference would simply delay consumer benefits).

235. Carriers respond to these pricing flexibility arguments in one of two ways. First, LECs argue that concerns about cross subsidies arising under price caps pay undeserved tribute to the fully distributed costing methodologies currently in use. LECs argue that parties who say they are concerned about cross subsidy may simply be motivated by a desire to maintain inefficient pricing umbrellas.[387] Second, LECs argue that price cap regulation, by formulating a ceiling on carrier rates, constrains LECs from recovering the costs associated with predation, whether in the current period, or at some future time.[388]

236. In addition to debating whether pricing flexibility produces economic benefits or harms, parties also debate whether the limited flexibility suggested in the Second Further Notice is the optimal solution. Most LECs either endorse or at least accept the proposal in the Second Further Notice to establish three baskets.[389] AT&T, supported by MCI and large user groups argues that, other than common line, the proposed baskets are drawn too broadly, leaving the LECs too much scope to fund price cuts in services where they might face competition by raising prices in services where no competitive alternatives to the LECs are feasible.[390] In response, the LECs

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387 SWB Reply at 21-24; Ameritech Reply at 9.

388 SWB Comments at 4-5; Ameritech Reply at 10.

389 Bell Atlantic Comments at 4 (three baskets "reasonably reflect practical distinctions among the local carrier's different interstate offerings"); US West Comments at 33; Alltel Reply at 14-15; Centel Reply at 22-23; USTA Comments at 31; PRTC Reply at 46; Rochester Comments at 2-3; Rochester Reply at 13; United Reply at 6; USTA Reply at 11, 26. See also Ohio PUC Comments at 6, 15 (supporting the three basket proposal). But see BellSouth Comments at 18-22 (arguing that productivity for common line is greater than for other LEC services and that services should be merged into a fewer number of baskets to recognize the different levels of achieved productivity); BellSouth Reply at 44; Contel Comments at 7 (one basket is necessary "to avoid pricing distortions" and permit carriers to manage their businesses effectively); SWB Comments at 6 & n.6 (demand for switched access services is cross-elastic and switched services should therefore be in one basket).

390 AT&T Comments at iv, 3-4, 26-30 (proposing separate baskets for common line, local switching, local transport, voice grade special access, high capacity digital special access, and all other digital special access). Ad Hoc, ICA, and API support AT&T's recommendation that we establish six baskets. Ad Hoc Reply and ICA Reply, ETI Report at 34; API Reply at 13-14. See also MCI Comments at 59-61 (traffic sensitive basket should be dissaggregated into separate transport and switching baskets); MCI Reply at 13; Ad Hoc Comments

argue that they may not be able to achieve 3 percent productivity gains uniformly across service categories, and that other safeguards, such as the number of service categories and the size of the annual pricing bands, protect ratepayers.[391]

237. With respect to the service categories within the bands, two LECs claim they would experience practical difficulties in complying with the proposal to apply separate bands to each of the service categories proposed for the special access basket.[392] LECs also express concern that the information element in the traffic sensitive basket, because it contains only one rate element, should not be a separate service category. LECs argue it should be folded into the local transmission category.[393] In addition, LECs argue that access elements such as equal access, Basic Service Elements included in the Open Network Architecture plans, and the 800 data base access

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at 23-24, 51-52 (also favoring dissaggregation of the traffic sensitive basket); TCA Comments at 12; Illinois Comments at 8, 9, 13; Colorado OCC Reply at 11; API Comments at 5-9 (recommending that special access be divided into a digital and high capacity basket and a voice grade and other basket); IDCMA Comments at 5-8; IDCMA Reply at 10-11; LOCATE Comments at 3-4; LOCATE Reply at 7; Metropolitan Comments at 25-26; Metropolitan Reply at 23-25; NY Clearinghouse Comments at 13 (recommending four separate digital baskets). But see BellSouth Reply at 46 (banding is sufficient protection, and additional baskets are not warranted); US West Comments at 40-41; PRTC Reply at 46 (sufficient substitutability among the various special access services to prevent anticompetitive pricing); Rochester Reply at 12.

391 Bell Atlantic Reply at 17-19; SWB Reply at 33-35; United Reply at 6-7; BellSouth Reply at 45; Pactel Reply at 17-19 (arguing that, in addition, LEC customers are in a position to challenge rates before this Commission and do not need special protections of the type designed to protect residential ratepayers in the AT&T price cap plan); Alltel Reply at 14-15; PRTC Reply at 45-47; Rochester Reply at 1-12.

392 Contel Comments at 10-11 (arguing for no separate service categories in the "all other" basket); SNET Reply at 13 (arguing that the vast majority of circuits in the special access category are in voice grade, digital data, and high capacity, while the remaining categories have little or no demand).

393 NYNEX Comments at 26-27; Contel Comments at 8-9.

element not be considered separate categories for banding purposes,[394] a view not shared by all commenters.[395]

238. The LECs generally accept the 5 percent upper limit on price band increases proposed in the Second Further Notice and oppose proposals to lower that ceiling.[396] Other parties generally contend that 5 percent upper limits do not represent a meaningful constraint because LECs have rarely attempted to raise any of their prices by that amount in recent years.[397] With respect to the 5 percent lower limit on annual price decreases, the LECs argue that the price floors proposed in the Second Further Notice would constrain their pricing flexibility to a greater extent than existing regulations.[398] Other parties are divided on this issue, with some supporting strict lower bands but many others, including AT&T and large user groups, arguing that LEC rate cuts exceeding 5 percent would benefit consumers and pose little threat to bypass competition, which many of them say will be

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394 NYNEX Comments at 26; SWB Comments at 7 & n.7; Contel Comments at 9-10; USTA Reply at 27; Pactel Comments at 33-34; US West Comments at 39; BellSouth Reply at 48.

395 See, e.g., Telenet Comments at 3-4.

396 Bell Atlantic Comments at 5; Pactel Comments at 30; SWB Reply at 34; USTA Reply at 26. But see Ameritech Comments at 35-36, Bell Atlantic Comments at 18-19, BellSouth Reply at 47 (all asserting that a significant share of their price changes have fallen outside of the plus or minus 5 percent range proposed in the Second Further Notice).

397 The ETI Report submitted by Ad Hoc and ICA with their comments purports to show that recent price increases for the three largest categories of interstate access service have rarely reached 5 percent. Ad Hoc Comments and ICA Comments, ETI Study at 32-33 (concluding that a 5 percent band will not constrain LEC pricing abuses); Ad Hoc Reply and ICA Reply, ETI Study at 2. Accord NY Clearinghouse Comments at 13-14. But see PRTC Reply at 49-50 (ETI Study actually demonstrates that the average price change has been about 5 percent).

398 Ameritech Comments at 35-36, 43 (most rate of return price changes have fallen outside the plus or minus 5 percent range); Bell Atlantic Comments at 6 (arguing that price floors simply protect competitors from the rigors of competition); Bell Atlantic Reply at 18-19; BellSouth Reply at 48-49; Pactel Comments at 32-33 (price ceilings prevent predatory activity and are not necessary to prevent rate churn); USTA Reply at 26-27; SNET Reply at 14 (danger of predatory pricing is remote); PRTC Comments at 35, 48 (price floors prevent LECs from responding to uneconomic bypass).

minimal regardless of whether we impose price floors on the LECs.[399] Due to the disparate views about price bands, the comments reveal a lack of consensus concerning the size of the bands we should impose.[400] Ad Hoc and ICA argue that there is no factual basis to support the plus or minus 5 percent bands proposed in the Second Further Notice.[401]

239. Parties also dispute the proposal to grant LECs full "credit" in their actual price index levels for all rate decreases this Commission

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399 Those supporting lower price bands are: Alltel Comments at 19; MCI Reply at 13 (lower bands help prevent rate churn); SBA Comments at 26-27 (lower bands are necessary to prevent predation); Justice Reply at 22-23 (rejecting the 5 percent band, and arguing for a standard based on average incremental cost); Missouri PSC at 8-9; NARUC Reply at 6-7. See also Metropolitan Comments at 27-29 (5 percent decreases each year could lead to predation, and therefore all price decreases should be subject to traditional tariff review standards). Those who object to lower bands are: NY Clearinghouse Comments at 15 (Commission can design other safeguards against predation); NY Clearinghouse Reply at 10-11; NAB Reply at 8-10 (no reason to include safeguards for non-existent competition for radio and television circuits); Networks Comments at 9; Networks Reply at 2; API Comments at 2-5 (rate floors will operate as a pricing umbrella); TCA Comments at 12-13. See also AT&T Comments at 31 n.* (arguing that we should eliminate price floors only if we impose a smaller upper band or create additional baskets).

400 AT&T Comments at 30 (upper limits of 2 percent should be applied if the baskets remain as proposed in the Second Further Notice); Alltel Comments at 19 (arguing that the LECs should have no pricing flexibility); NY Clearinghouse Comments at 14 (traffic sensitive elements should have 1 percent upward flexibility and the "all other" basket should have 2 percent upward flexibility); Illinois Reply at 8-9 (reduce LEC bands to the levels imposed on AT&T); Missouri PSC Comments at 8-9 (no upward pricing flexibility should be granted); NARUC Reply at 6-7 (arguing for no upward pricing flexibility); Ohio PUC Comments at 6-7 (arguing that upward flexibility should be limited to 2 percent); SWB Reply at 34 (accepting the plus or minus 5 percent bands as proposed).

401 Ad Hoc and ICA Comments, ETI Study, Attachment C, Table C-1 (projecting a 4.73 percent average decline in price per minute of use for traffic sensitive switched access services in 1989), Table C-2 (16.3 percent average decline in prices charged for voice grade special access circuits between March 1988 and April 1989), Table C-3 (17.7 percent average decline in prices charged for high capacity special access circuits between March 1988 and April 1989); Ad Hoc Reply and ICA Reply, ETI Report at 2.

permits to take effect. LECs favor an actual price index that fully reflects the state of prices in the basket.[402] Michigan PSC, however, argues that index "credit" should only be given for price decreases within the 5 percent lower band.[403]

C. Discussion

240. Rate of return regulation has produced a set of prices for interstate access that reflect the fully distributed costing methods used to determine the costs underlying the rates.[404] Price caps, which employs changes in LEC industry costs to create a price ceiling, does not require that prices be determined on the basis of fully distributed costs.[405] In a "pure" price cap system, in which the sole objective would be to enhance economic efficiency, price cap carriers would have unlimited discretion to adjust prices to their most efficient levels within the cap.[406] The proposal advanced in the Second Further Notice, however, limits LECs' ability to move prices. Services are divided into baskets, and are further subdivided into service categories. Baskets prevent LECs from offsetting a rate decrease in, for example, special access, with a rate increase in the carrier common line charge. Service categories serve a similar function within the baskets, and price movements for each category are limited to plus or minus 5 percent each year, adjusted for the change in the price cap index.

241. The record we received in response to the Second Further Notice generally supports an approach that limits pricing flexibility. In this Supplemental Notice, we tentatively agree that some limits to pricing flexibility are required, and we also tentatively conclude that LECs must be permitted limited flexibility to realign their prices in keeping with a new regulatory regime. We seek comment on that conclusion.

242. Our tentative decision to permit a limited degree of pricing flexibility stems from two different concerns. On one hand, a price cap mechanism that does not include the baskets and bands proposed in the Second Further Notice fails to achieve rate stability for LECs' customers. By

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402 Ameritech Reply at 40; Rochester Comments at 3; PRTC Reply at 50-51.

403 Michigan PSC Comments at 6.

404 See Section II, supra.

405 Second Further Notice, 4 FCC Rcd at 3277 (para. 841) (disbanding the Part 69 cost allocation rules for price cap carriers, except for common line allocations).

406 See id. at 3051 (para. 359).

limiting the amount of pricing flexibility a LEC can exercise, we can ensure that rates will remain relatively constant from one period to the next, moving only incrementally. On the other hand, limited pricing flexibility is necessary if underlying costs change. By comparison, a rate freeze, or a plan that incorporates no flexibility, would ignore gradual cost changes.

243. In reaching the tentative conclusion that LEC access prices be accorded limited flexibility, we tentatively reject the view, advocated by some parties, that pricing flexibility is a synonym for predatory pricing. Predatory pricing occurs when a producer prices a service below cost so as to drive a rival from the market. We tentatively disagree with commenters who appear to argue that any price below that dictated by our current, fully distributed costing methodology constitutes predation.[407] The price cap prevents the recoupment of past predatory rates; a price cap prevents prices from being raised in the current or future period to make up for losses incurred by rates set at predatorily low levels. Furthermore, the proposed price cap plan would require additional tariff showings if rates in any service category drop more than 5 percent per year.[408]

244. We also seek additional comment on how best to design a system of limited pricing flexibility. Most parties seeking to refine our proposals have focused on the addition of baskets. We tentatively reject this approach. Each time a basket is created, the services within that basket are subject to a separate price cap index and the scope for efficiency-enhancing pricing flexibility is reduced. Prices within that basket may move, in the aggregate, no more than a measure of inflation less our proposed productivity offset. In other words, carriers seeking to generate additional earnings must be able to generate productivity gains of 3 percent per year on a basket-by-basket basis. We tentatively find that this relationship argues against a larger number of baskets. We therefore tentatively reject calls to create individual baskets for each Part 69 access element or for small groups of special access services.[409]

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407 Definitions of predation vary, although courts generally look to see if a price is below marginal cost, or its surrogate, average variable cost. See, e.g., Further Notice, 3 FCC Rcd at 3372 n.709 and cases cited therein; Areeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697 (1975); McGee, Predatory Pricing Revisited, 23 J. Law. and Econ. 289 (1980); Cargill v. Montford of Colorado, 479 U.S. 104, 117 n.12 (1986).

408 See Second Further Notice, 4 FCC Rcd at 3259 (para. 805).

409 Our tentative conclusion not to disaggregate special access into separate baskets also stems from the small proportion of revenues that most LECs derive from special access. On an industry-wide basis, special access amounts to only approximately 15 percent of LEC revenues.

245. Our tentative view is that the solution to managing the migration to efficiency-enhancing prices lies in a combination of elements: (1) the number of service categories in a basket and the combination of services in those categories; (2) the size of the pricing bands that dictate maximum annual movement in prices; (3) whether carriers receive credit in their indexes for rate decreases below the lower band; (4) the extent to which prior Commission decisions concerning special access pricing should form a basis for any pricing rules we choose to impose under the new regime; and (5) whether we should craft any other special pricing rules in the form of subindexes, as we did in the case of AT&T's residential and small business basket.[410] We are seeking through this Supplemental Notice to supplement the record concerning LEC pricing flexibility. We seek further comment on the policy balance struck in the Second Further Notice to limit pricing flexibility through the use of baskets and bands. We also request parties to file any empirical evidence they may have that would assist us in determining how best to manage this regulatory reform.

246. We call particular attention to prior Commission decisions concerning rate relationships between various special access services. In the Second Further Notice, the Commission sought comment on whether the pricing guidelines promulgated in the Strategic Price Order should continue to be applied in a price cap environment. Since that time, we have reconsidered and abandoned the prospective application of those guidelines.[411] In the wake of our Strategic Reconsideration Order, rates for voice grade and high capacity special access services will generally not be suspended if they fall within a range of reasonableness defined as approximately four to eight voice grade circuits to one high capacity circuit.[412] Other rate relationships for other special access services have been established under rate of return, as well. For example, the Commission has established a presumptive 1.6:1 price relationship between 4-wire and 2-wire service.[413] We request comment on

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410 Second Further Notice, 4 FCC Rcd at 3054 (para. 364).

411 Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166 (Phase II, Part 1), FCC 89-330 (released Jan. 19, 1990) (Strategic Reconsideration Order).

412 Id. at para. 73.

413 See Western Union Corp. v. FCC, 856 F.2d 315 (D.C. Cir. 1988) (remanding the Commission's decision not to treat metallic circuits as a 2-wire service for the purpose of applying the ratio).

whether these relationships, promulgated under a rate of return system, should retain vitality under a price cap regime. We also request that commenters submit to us any special pricing rules that they believe would enhance our ability to ensure that carriers retain limited flexibility, such as a subindex of rates similar to that adopted for AT&T.[414]

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414 See 47 C.F.R. § 61.47(f).

VI. PAPERWORK REDUCTION ACT ANALYSIS

247. On May 11, 1989, after the release of the Second Further Notice in this proceeding, the Commission requested that the Office of Management and Budget (OMB) review the information collection requirements proposed in that notice for compliance with the Paperwork Reduction Act. In its submission to OMB, the Commission identified three ways the proposed price cap rules would affect LEC paperwork burdens: (a) a reduction in burden hours associated with the tariff review process; (b) an increase in burden hours associated with service quality monitoring; and (c) a decrease in burden hours associated with rate of return reporting. Overall, the decreases in burden hours associated with tariff review and rate of return reporting greatly outweighed the increase in burdens for service quality monitoring. On July 10, 1989, OMB advised that it had approved the Commission's proposed information collection requirements.[415]

248. In light of the provisions of the Paperwork Reduction Act and the information collection requirements proposed in the Second Further Notice, we have analyzed the revisions proposed in this Supplemental Notice to see what, if any, impact they might have on those requirements. We find that the proposals made and tentative decisions reached in this Supplemental Notice would not change the information collection burdens we previously identified in the Second Further Notice. Accordingly, this Supplemental Notice does not solicit comments on the information collection requirements contained in the current proposal. For the same reason, we will not request OMB review of these latest revisions to that proposal. However, if after reviewing the record, we determine that any significant modifications of the approved collection requirements are necessary, those proposed modifications will be submitted to OMB prior to implementation.

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415 Notice of OMB Action, OMB No. 3060-0421, from James B. Macrae, Deputy Administrator, Office of Information and Regulatory Affairs, to Terry D. Johnson, Federal Communications Commission. OMB approved the use of these information collection requirements through April 30, 1992.

VII. REGULATORY FLEXIBILITY ACT ANALYSIS

249. We certify that the Regulatory Flexibility Act[416] is not applicable to the rule changes proposed for LECs in this proceeding. In accordance with the provisions of Section 605 of that Act, a copy of this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration at the time a summary of this Supplemental Notice is published in the Federal Register.

250. As part of our analysis of the record in this proceeding, however, this Commission has considered the impact of its proposals on small LECs, i.e., those LECs serving 50,000 or fewer access lines. Since this Supplemental Notice makes few modifications to the incentive regulation proposals set forth in the Second Further Notice, the Regulatory Flexibility analysis performed in that document continues to apply to our current proposals. As the Second Further Notice stated, the proposal to make incentive regulation optional for eligible depooled carriers below the Tier 1 level means that no small carrier will be forced to change the method by which it is regulated. In addition, nothing proposed in the Second Further Notice or this Supplemental Notice would impair the various programs the Commission has established to support small carriers. The proposals for incentive regulation of LECs will enable eligible small companies to take advantage of the benefits of incentive regulation at their option, while ensuring that the status quo is maintained for other small carriers that are not eligible or that elect not to participate.

VIII. EX PARTE REQUIREMENTS

251. For purposes of this non-restricted notice and comment rulemaking proceeding concerning LECs, members of the public are advised that ex parte presentations are permitted except during the "Sunshine Agenda" period. See generally Section 1.1206(a) of this Commission's Rules. The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and

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416 Because of the nature of local exchange and access service, the Commission has concluded that small telephone companies are dominant in their fields of operation and therefore are not small entities as defined by the Regulatory Flexibility Act. See MTS and WATS Market Structure, 93 FCC 2d 241, 338-39 (1983). Thus, this Commission is not required by the terms of that Act to apply the formal procedures set forth therein. We are nevertheless committed to reducing the regulatory burdens on small telephone companies whenever possible consistent with our other public interest responsibilities. Accordingly, we have chosen to utilize, on an informal basis, appropriate Regulatory Flexibility Act procedures to analyze the effect of proposed regulations on small telephone companies.

terminates when this Commission (1) releases the text of a decision or Order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. See Section 1.1202(f) of this Commission's Rules. During the Sunshine Agenda period, no presentations, ex parte or otherwise, are permitted unless specifically requested by this Commission or Commission staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. See Section 1.1203 of this Commission's Rules.

252. In general, an ex parte presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding; or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. See Section 1.1202(b) of this Commission's Rules. Any person who makes or submits a written ex parte presentation shall provide, on the same day it is submitted, two copies of same under separate cover to this Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an ex parte presentation.

253. Any person who in making an oral ex parte presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide, on the day of the oral presentation, a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an ex parte presentation. See Section 1.1206 of this Commission's Rules.

254. All relevant and timely comments and reply comments will be considered by this Commission. In reaching our decision, this Commission may take into account information and ideas not contained in the comments, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of this Commission's reliance on such information is noted in the Order.

IX. ORDERING CLAUSES

255. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 201-205, 303(r), and 403 of the Communications Act of 1934, 47 U.S.C §§ 154(i), 154(j), 201-205, 303(r), 403, and Section 553 of Title 5, United States Code, NOTICE IS HEREBY GIVEN of proposed amendments to Part 61, Part 65, and Part 69, and Sections 61.3, 61.38, 61.39, 61.41, 61.42, 61.43, 61.44,

61.45, 61.48, 61.49, 61.58, 65.1, 65.600, 65.701, 65.703, 69.1, 69.3, 69.101, 69.105, 69.111, 69.113, 69.114, 69.205, 69.301, 69.302, 69.303, 69.304, 69.305, 69.306, 69.307, 69.308, 69.309, 69.310, 69.401, 69.402, 69.403, 69.404, 69.405, 69.406, 69.407, 69.408, 69.409, 69.410, and 69.411 of this Commission's Rules, 47 C.F.R. Part 61, Part 65, and Part 69, §§ 61.3, 61.38, 61.39, 61.41, 61.42, 61.43, 61.44, 61.45, 61.48, 61.49, 61.58, 65.1, 65.600, 65.701, 65.703, 69.1, 69.3, 69.101, 69.105, 69.111, 69.113, 69.114, 69.205, 69.301, 69.302, 69.303, 69.304, 69.305, 69.306, 69.307, 69.308, 69.309, 69.310, 69.401, 69.402, 69.403, 69.404, 69.405, 69.406, 69.407, 69.408, 69.409, 69.410, 69.411, in accordance with the proposals, discussion, and statement of issues in this Supplemental Notice, and as set forth in Appendix B to this Order, and that COMMENT IS SOUGHT regarding such proposals, discussion, and statement of issues.

256. IT IS FURTHER ORDERED that the motion to accept late-filed comments submitted by the Public Service Commission of the District of Columbia IS GRANTED.

257. IT IS FURTHER ORDERED that, in accordance with the provisions of Section 1.419(b) of this Commission's Rules, 47 C.F.R. § 1.419(b), an original and five copies of all comments, replies, pleadings, briefs, and other documents filed in the proceeding SHALL BE FURNISHED to this Commission. In addition, parties should file ten copies of any such pleadings with the Price Cap Task Force, Common Carrier Bureau, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with this Commission's copy contractor, International Transcription Services, Inc., Suite 140, 2100 M Street, N.W. Washington, D.C. 20037. Members of the public who wish to express their views by participating informally may do so by submitting one or more copies of their comments without regard to form (so long as the docket number is clearly stated in the heading). Copies of all pleadings and other filings will be available for public inspection during regular business hours in this Commission's Docket Reference Room (Room 239) at our headquarters at 1919 M Street, N.W., Washington, D.C. 20554.

258. IT IS FURTHER ORDERED that comments on this Supplemental Notice of Proposed Rulemaking SHALL BE DUE not later than April 27, 1990, and that reply comments SHALL BE DUE not later than May 29, 1990.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

LIST OF PARTIES

The following parties filed comments:

Ad Hoc Telecommunications Users Committee (Ad Hoc)
Alabama Public Service Commission (Alabama PSC)
Alltel Corporation (Alltel)
Allnet Communications Services, Inc. (Allnet)
Association for Local Telecommunications Services (Local Telecom)
Ameritech Operating Companies (Ameritech)
American Petroleum Institute (API)
American Telephone and Telegraph Company (AT&T)
Bell Atlantic Telephone Companies (Bell Atlantic)
BellSouth Corporation, South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company (BellSouth)
California Public Utilities Commission (California PUC)
Capital Cities/ABC, CBS, and NBC (Networks)
Cincinnati Bell Telephone Company (CBT)
Central Telephone Company (Centel)
Contel Corporation (Contel)
Citizens for a Sound Economy Foundation (CSE)
David Systems, Inc. (David)
D.C. Public Service Commission (DC PSC)
Federal Executive Agencies (Executive Agencies)
Citizens of Florida (Florida Citizens)
GTE Telephone Operating Companies (GTOC)
State of Hawaii (Hawaii)
International Communications Association (ICA)
Independent Data Communications Manufacturers Association, Inc. (IDCMA)
Information Industry Association (IIA)
Illinois Commerce Commission (Illinois)
Indiana Office of Utility Consumer Counselor with National Association of State Utility Consumer Advocates (Indiana UCC)
Integrated Network Corporation (Integrated Network)
Iowa State Utilities Board (Iowa)
Lincoln Telephone Company (Lincoln)
Local Area Telecommunications (LOCATE)
MCI Telecommunications Corporation (MCI)
Maryland People's Counsel (Maryland PC)
Metropolitan Fiber Systems, Inc. (Metropolitan)
Michigan Public Service Commission Staff (Michigan PSC)
Missouri Public Service Commission (Missouri PSC)
National Exchange Carrier Association (NECA)
New York Clearinghouse Association, et al. (NY Clearinghouse)
National Telephone Cooperative Association (NTCA)
New York State Department of Public Service (New York DPS)

New York Telephone Company and New England Telephone and Telegraph Company (NYNEX)
Ohio Public Utilities Commission (Ohio PUC)
Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO)
Pacific Bell and Nevada Bell (Pactel)
Public Service Commission of West Virginia (W. Virginia PSC)
Puerto Rico Telephone Company (PRTC)
Rochester Telephone Corporation (Rochester)
Ronan Telephone Company (Ronan)
Small Business Administration (SBA)
Southern New England Telephone Company (SNET)
Southwestern Bell Telephone Company (SWB)
Telephone and Data Systems, Inc. (TDS)
Tele-Communications Association (TCA)
Telephone Utilities Exchange Carrier Association (TUECA)
Telenet Communication Corporation (Telenet)
United Telephone System Companies (United)
University Group Projects, Inc. (University)
United States Telephone Association (USTA)
Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company (US West)
Verilink Corporation (Verilink)

The following parties filed reply comments:

Ad Hoc
Alltel
Local Telecom
Ameritech
API
AT&T
Bell Atlantic
BellSouth
CBT
Centel
Consumer Federation of America (CFA)
Colorado Office of Consumer Counsel (Colorado OCC)
DC PSC
Department of Justice (Justice)
Executive Agencies
GTOC
Hawaii
ICA
IDCMA
Illinois
Illinois Consolidated Telephone Company (Illinois Telco)
Indiana UCC
Long Distance/USA (LD/USA)

LOCATE
MCI
Maryland PC
Metropolitan
National Association of Broadcasters (NAB)
National Association of Regulatory Utility Commissioners (NARUC)
National Cable Television Association, Inc. (NCTA)
Networks
NY Clearinghouse
NTCA
NYNEX
Office of the Ohio Consumers' Counsel (Ohio Counsel)
Ohio PUC
OPASTCO
Pactel
PRTC
Rochester
SNET
SWB
TDS
TCA
TUECA
United
USTA
US West

APPENDIX B

PROPOSED AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS

Title 47 of the CFR, Parts 61, 65, and 69 are proposed to be amended as follows:

PART 61 -- TARIFFS

1. The authority citation for Part 61 continues to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply sec. 203, 48 Stat. 1070; 47 U.S.C. 203.

2. Section 61.3 is amended by revising paragraphs (u) and (w) to read as follows:

§ 61.3 Definitions.

* * * * *

(u) Price Cap Index (PCI). An index of costs facing carriers subject to price cap regulation, which index is calculated for each basket pursuant to §§ 61.44 or 61.45. * * * * *

(w) Price cap tariff. Any tariff filing involving a service that is within a price cap basket, or that requires calculations pursuant to §§ 61.44, 61.45, 61.46, or 61.47.

* * * * *

3. Section 61.38(a) is amended by revising the last sentence to read as follows:

§ 61.38 Supporting information to be submitted with letters of transmittal.

(a) * * * This section (other than the preceding sentence of this paragraph) shall not apply to tariff filings proposing rates for services identified in §§ 61.42(a), (b), (d), (e), and (g), which filings are submitted by carriers subject to price cap regulation.

* * * * *

4. Section 61.39(a) is amended by adding the following new sentence at its end to read as follows:

§ 61.39 Optional supporting information to be submitted with letters of transmittal for Access Tariff filings effective on or after January 1, 1989, by local exchange carriers serving 50,000 or fewer access lines that are described as subset 3 carrier in § 69.602.

(a) * * * This section (other than the preceding sentence of this paragraph) shall not apply to tariff filings proposing rates for services

identified in §§ 61.42(d), (e), and (g), which filings are submitted by carriers subject to price cap regulation.

* * * * *

5. Section 61.41 is revised to read as follows:

§ 61.41 Price cap requirements generally.

(a) Sections 61.42 through 61.49 shall apply as follows:

(1) To dominant interexchange carriers, as specified by Commission order;

(2) To Tier 1 local exchange carriers, as defined by Commission order, which are not participants in any Association tariff effective January 1, 1991, and to all local exchange carriers, other than average schedule companies, that are affiliated with such carriers; and

(3) On an elective basis, to local exchange carriers, other than those specified in paragraph (2), that are neither participants in any Association tariff effective January 1, 1991, nor affiliated with any such participants, except that affiliation with average schedule companies shall not bar a carrier from electing price cap regulation provided the carrier is otherwise eligible.

(b) If a telephone company, or any one of a group of affiliated telephone companies, files a price cap tariff in one study area, that telephone company and its affiliates, except its average schedule affiliates, must file price cap tariffs in all their study areas. No telephone company that files a price cap tariff may participate in an Association tariff.

6. Section 61.42 is amended by redesignating paragraph (d) as paragraph (g) and revising the first sentence thereof, and by adding new paragraphs (d), (e), and (f) to read as follows:

§ 61.42 Price cap baskets and service categories.

* * * * *

(d) Each local exchange carrier subject to price cap regulation shall establish three baskets as follows:

(1) A basket for the common line interstate access elements as described in § 69.105 of this chapter;

(2) A basket for traffic sensitive switched interstate access elements; and

(3) A basket for interstate services other than services described in paragraphs (d)(1) or (d)(2) of this section.

(e)(1) The traffic sensitive switched access basket shall contain such services as the Commission shall permit or require, including the following service categories; (i) local switching as described in § 69.106; (ii) information, as described in § 69.109; and (iii) transport, as described in § 69.111 of this chapter.

(2) The basket for interstate services other than interstate switched access services shall contain such services as the Commission shall permit or require, including special access, as described in § 69.113 of this chapter, and non-access services.

(f) Each local exchange carrier subject to price cap regulation shall exclude the following offerings from their price cap baskets:

(1) Special construction services;

(2) Services offered on an individual case basis (ICB).

(g) New services, other than those within the scope of paragraphs (c) and (f) of this section, * * *

7. Section 61.43 is amended by revising the first sentence to read as follows:

§ 61.43 Annual price cap filings required.

Carriers subject to price cap regulation shall submit annual price cap tariff filings that propose rates for the upcoming year, that make appropriate adjustments to their PCI, API, and SBI values pursuant to §§ 61.44 through 61.47, and that incorporate the costs and rates of new services into the PCI, API, or SBI calculations pursuant to §§ 61.44(g), 61.45(g), 61.46(b), and 61.47(b) and (c). * * *

8. Section 61.44 is amended by revising the heading and first sentences of paragraphs (a) and (b) to read as follows:

§ 61.44 Adjustments to the PCI for Dominant Interexchange Carriers.

(a) Dominant interexchange carriers subject to price cap regulation shall file adjustments to the PCI for each basket as part of the annual price cap tariff filing, and shall maintain updated PCIs to reflect the effect of mid-year access and exogenous cost changes. * * *

(b) Subject to paragraph (d) of this section, adjustments to each PCI of dominant interexchange carriers subject to price cap regulation shall be made pursuant to the following formula: * * *

* * * * *

9. New section 61.45 is added to read as follows:

§ 61.45 Adjustments to the PCI for Local Exchange Carriers.

(a) Local exchange carriers subject to price cap regulation shall file adjustments to the PCI for each basket as part of the annual price cap tariff filing, and shall maintain updated PCIs to reflect the effect of mid-year exogenous cost changes.

(b) Subject to paragraphs (e) and (f) of this section, adjustments to local exchange carrier PCIs for the baskets designated in §§ 61.42(d)(2) and (3) shall be made pursuant to the following formula:

$$PCI_t = PCI_{t-1}[1 + w(GNP\text{-}PI - X) + \Delta Z/R + \Delta Y/R]$$

where

GNP-PI = the percentage change in the GNP-PI between the quarter ending six months prior to the effective date of the new annual tariff and the corresponding quarter of the previous year,

X = productivity factor of 3.0%,

ΔY = (new access rate - access rate at the time the PCI was updated to PCI_{t-1}) x (base period demand),

ΔZ = the dollar effect of current regulatory changes when compared to the regulations in effect at the time the PCI was updated to PCI_{t-1}, measured at base period level of operations,

R = base period quantities for each rate element "i", multiplied by the price for each rate element "i" at the time the PCI was updated to PCI_{t-1},

$w = R + \Delta Z$, all divided by R,

PCI_t = the new PCI value, and

PCI_{t-1} = the immediately preceding PCI value.

(c) Subject to paragraphs (e) and (f) of this section, adjustments local exchange carrier PCIs for the basket designated in § 61.42(d)(1) shall be made pursuant to the following formula:

$$PCI_t = PCI_{t-1}[1 + w[(GNP\text{-}PI - X) + (g/2)(GNP\text{-}PI - X - 1)]/(1 + g) + \Delta Z/R]$$

where

GNP-PI = the percentage change in the GNP-PI between the quarter ending six months prior to the effective date of the new annual tariff and the corresponding quarter of the previous year,

X = productivity factor of 3.0%,

g = the ratio of minutes of use per access line during the base period, to minutes of use per access line during the previous base period, minus 1,

ΔZ = the dollar effect of current regulatory changes when compared to the regulations in effect at the time the PCI was updated to PCI_{t-1}, measured at base period level of operations,

R = base period quantities for each rate element "i", multiplied by the price for each rate element "i" at the time the PCI was updated to PCI_{t-1},

w = $R + \Delta Z$, all divided by R,

PCI_t = the new PCI value, and

PCI_{t-1} = the immediately preceeding PCI value.

(d) The exogenous cost changes represented by the term "ΔZ" in the formulas detailed in paragraphs (b) and (c), shall be limited to those cost changes that the Commission shall permit or require, and include those caused by (1) the completion of the amortization of depreciation reserve deficiencies; (2) changes in the Uniform System of Accounts; (3) changes in the Separations Mannual; (4) changes to the level of obligation associated with the Long Term Support Fund and the Transitional Support Fund described in § 69.612 of this chapter; (5) the reallocation of investment from regulated to nonregulated activities pursuant to § 64.901 of this chapter; and (6) such tax law changes and other extraordinary exogenous cost changes as the Commission shall permit or require. These exogenous cost changes shall be apportioned on a cost-causative basis between price cap services as a group, and excluded services as a group. Exogenous cost changes thus attributed to price cap services shall be further apportioned on a cost-causative basis among the price cap baskets.

(e) The "w(GNP-PI - X)/100" component of the PCI formula contained in paragraph (b), and the "w[GNP-PI - X) + (g/2)(GNP-PI - X - 1)]/(1 + g)"

component of the PCI formula contained in paragraph (c) shall be employed only in the adjustment made in connection with the annual price cap filing.

(f)(1) In the event that a LEC subject to price cap regulation experiences a rate of return during any base period representing a return above the price cap upper formula adjustment mark prescribed by the Commission, the values assigned to the "PCI_{t-1}" component of that LEC's PCIs shall be adjusted downward to the levels that would have yielded a base period rate of return equal to that formula adjustment mark and (2) in the event that a LEC subject to price cap regulation experiences a rate of return during any base period representing a return below the lower formula adjustment mark prescribed by the Commission, the values assigned to the "PCI_{t-1}" component of that LEC's PCIs shall be adjusted upward to the levels that would have yielded a base period rate of return equal to that lower mark. The adjustment shall occur as part of the annual price cap filing immediately following the base period in which the LEC's return was above the upper mark or below the lower mark.

(g) The exogenous costs caused by new services subject to price cap regulation must be included in the appropriate PCI calculations under paragraphs (b) or (c) of this section beginning at the first annual price cap tariff filing following completion of the base period in which they are introduced.

(h) In the event that a price cap tariff becomes effective, which tariff results in an API value (calculated pursuant to § 61.46) that exceeds the currently applicable PCI value, the PCI value shall be adjusted upward to equal the API value.

10. Section 61.48 is amended by adding paragraphs (c), (d), and (e) to read as follows:

§ 61.48 Transition rules for price cap formula calculations.

* * * * *

(c) Local exchange carriers subject to price cap regulation shall file initial price cap tariffs not later than October 3, 1990, to be effective January 1, 1991.

(d) In connection with the initial price cap filing described in paragraph (c) of this section, each PCI, API, and SBI shall be assigned an initial value prior to adjustment of 100, corresponding to the costs and rates in effect as of July 1, 1990.

(e) In connection with the initial price cap filing described in paragraph (c) of this section, initial PCI calculations shall be made without adjustment for any changes in inflation or productivity. Annual price cap filings incorporating the full values of the GNP-PI and productivity offsets will commence April 2, 1991, with a scheduled effective date of July 1, 1991.

11. Section 61.49 is amended by revising paragraph (a) and the last sentence of paragraph (g) to read as follows:

§ 61.49 Supporting information to be submitted with letters of transmittal for tariffs of carriers subject to price cap regulation

(a) Each price cap tariff filing must be accompanied by supporting materials sufficient to calculate required adjustments to each PCI, API, and SBI pursuant to the methodologies provided in §§ 61.44, 61.45, 61.46, and 61.47.

* * * * *

(g) * * * Each such tariff filing must also be accompanied by data sufficient to make the API and PCI calculations required by §§ 61.46(b), 61.44(g), and 61.45(g), and, as necessary, to make the SBI calculations provided in §§ 61.47(b) and (c).

12. Section 61.58(c) is amended by revising paragraphs (c)(1), (c)(5), and (c)(6) to read as follows:

§ 61.58 Notice Requirements.

* * * * *

(c) * * *

(1) For annual adjustments to the PCI, API, and SBI values under §§ 61.44, 61.46, and 61.47, respectively, dominant interexchange carrier filings must be made on at least 45 days' notice. For annual adjustments to the PCI, API, and SBI values under §§ 61.45, 61.46, and 61.47, respectively, local exchange carrier tariff filings must be made on not less than 90 days' notice.

* * * * *

(5) Tariff filings involving a change in rate structure of a service included in a basket listed in § 61.42(a) or § 61.42(d), or the introduction of a new service within the scope of § 61.42(g), must be made on at least 45 days' notice.

(6) The required notice for tariff filings involving services included in § 61.42(c) or § 61.42(f), or involving changes to tariff regulations, shall be that required in connection with such filings by dominant carriers that are not subject to price cap regulation.

PART 65 -- INTERSTATE RATE OF RETURN PRESCRIPTION PROCEDURES AND METHODOLOGIES

1. The authority citation for Part 65 continues to read as follows:

Authority: Secs. 4, 201, 202, 203, 205, 218, 403, 48 Stat. 1066, 1072, 1077, 1094, as amended, 47 U.S.C. 154, 201, 202, 203, 205, 218, 403.

2. Section 65.1 is revised to read as follows:

§ 65.1 Application of Part 65.

This part establishes procedures and methologies for Commission prescription of interstate rates of return. This part shall apply to those interstate services and carriers as the Commission shall designate by order. This part shall not apply to dominant interexchange carriers subject to §§ 61.41 through 61.49, except as set forth in §§ 65.600(c), 65.701(c) and 65.703(g) of this chapter. Local exchange carriers subject to §§ 61.41 through 61.49 are exempt from the requirements of this part with the following exceptions: (1) carriers that meet the requirements of § 65.200(b) shall be subject to the filing requirements of Subpart C of this part; (2) carriers subject to §§ 61.41 through 61.49 shall employ the rate of return value calculated for the LEC industry in complying with any applicable rules under Parts 36 and 69 that require a return component; and (3) carriers subject to §§61.41 through 61.49 shall be subject to §§ 65.600(d), 65.701(c), and 65.703(g).

3. Section 65.600 is amended by revising paragraph (b) and adding new paragraph (d), to read as follows:

(a) * * * * *

(b) Each local exchange carrier or group of affiliated carriers which is not subject to §§ 61.41 through 61.49 of this chapter and which has filed individual access tariffs during the preceding enforcement period shall file with the Commission within three (3) months after the end of each calendar quarter, a quarterly rate of return monitoring report. Each report shall contain two parts. The first part shall contain rate of return information on a cumulative basis form the start of the enforcement period through the end of the quarter being reported. The second part shall contain similar information for the most recent quarter. The final quarterly monitoring report for the entire enforcement period shall be considered the enforcement period report. Reports shall be filed on the appropriate report form prescribed by the Commission (see § 1.795 of this chapter) and shall provide full and specific answers to all questions propounded and information requested in the currently effective report form. The number of copies to be filed shall be specified in the applicable report form. At least one copy of the report shall be signed on the signature page by the responsible officer. A copy of each report shall be retained in the principal office of the respondent and shall be filed in such manner as to be readily available for reference and inspection. Final adjustments to the enforcement period report shall be made by September 30 of the year following the enforcement period to

ensure that any refunds can be properly reflected in an annual access filing. For local exchange carriers subject to §§ 61.41 through 61.49 of this chapter, final adjustments to the final enforcement period report covering the period ending December 31, 1990, shall be made no later than October 1, 1991.

* * * * *

(d) Each local exchange carrier or group of affiliated carriers subject to §§ 61.41 through 61.49 of this chapter shall file with the Commission within three (3) months after the end of each calendar year a report of its total interstate access rate of return for that year. Such filings shall include a report of the total revenues, total expenses and taxes, operating income, and the rate base. At least one copy of the report shall be signed on the signature page by the responsible officer. A copy of each report shall be retained in the principal office of the respondent and shall be filed in such manner as to be readily available for reference and inspection.

4. Section 65.701 is amended by adding paragraph (d) to read as follows:

§ 65.701 Period of Review.

* * * * *

(d) Notwithstanding other provisions in this subpart, the final period of review for any local exchange carrier subject to §§ 61.41 through 61.49 of this chapter shall end on December 31, 1990.

5. Section 65.703 is amended by revising the first sentence of paragraph (g) and by adding new paragraph (h) to read as follows:

§ 65.703 Refunds.

* * * * *

(g) For interexchange carriers subject to §§ 61.41 through 61.49 of this chapter, refund obligations incurred prior to the date their tariffs filed pursuant to §§ 61.41 through 61.49 of this chapter take effect for the first time shall be effectuated by an adjustment to the applicable Actual Price Index, Service Band Index, and Price Cap Index (as defined in § 61.3 of this chapter). * * *

(h) For each local exchange carrier subject to §§ 61.41 through 61.49 of this chapter, refund obligations incurred prior to the end of its final period of review shall be effectuated by an adjustment to the applicable Actual Price Index, Service Band Index, and Price Cap Index (as defined in § 61.3 of this chapter). Carriers making an adjustment to effectuate any outstanding refund requirements from their final enforcement period shall make such adjustments no later than the next scheduled annual price cap adjustment tariff filing following the submission of the final enforcement report. The adjustment shall complete the required refund within 12 months.

Upon completion of the required refund, the Actual Price Index, the Service Band Index, or the Price Cap Index shall be adjusted to remove the effect of the adjustment.

PART 69 -- ACCESS CHARGES

1. The authority citation for Part 69 continues to read as follows:

Authority: Secs. 4, 201, 202, 203, 205, 218, 403, 48 Stat. 1066, 1070, 1072, 1077, 1094, as amended, 47 U.S.C. 154, 201, 202, 203, 205, 218, 403, unless otherwise noted.

2. Section 69.1 is amended by adding paragraph (c), as follows:

§ 69.1 Application of access charges.

* * * * *

(c) The following provisions of this part shall apply to telephone companies subject to price cap regulation only to the extent that they are necessary to develop the nationwide average carrier common line charge: §§ 69.3(f), 69.103(b), 69.105(b)(4), 69.105(b)(5), 69.106(b), 69.107(b), 69.107(c), 69.109(b), 69.111(c), 69.112(a), 69.112(b)(2), 69.112(b)(3), 69.112(d)(2), 69.112(d)(3), 69.114(b), 69.114(d), 69.205(e), 69.301 through 69.310, and 69.401 through 69.412.

3. Section 69.3 is amended by revising paragraphs (a) and (e)(4), and by adding a new paragraph (h) as follows:

§ 69.3 Filing of access service tariffs.

(a) Except as provided in paragraphs (f) and (g), a tariff for access service shall be filed with this Commission for an annual period. Such tariffs shall be filed on a minimum of 90 days' notice with a scheduled effective date of July 1. Such tariff filings shall be limited to rate level changes.

* * * * *

(e) * * *

(4) Except for charges subject to price cap regulation as that term is defined in § 61.3(v) of this chapter, any charge in such a tariff that is not an association charge must be computed to reflect the combined investment and expenses of all companies that participate in such a charge;

* * * * *

(h) Local exchange carriers subject to price cap regulation as that term is defined in § 61.3(v) of this chapter, shall file with this Commission a price cap tariff for access service for an annual period. Subject to § 61.48, such tariffs shall be filed to provide a minimum of 90 days' notice with a scheduled effective date of July 1. Such tariff filings shall be limited to changes in the Price Cap Indexes, rate level changes (with corresponding adjustments to the affected Actual Price Indexes and Service

Band Indexes), and the incorporation of new services into the affected indexes as required by § 61.49 of this chapter.

4. Sec. 69.101 is revised to read as follows:

§ 69.101 General.

Except as provided in § 69.1 and Subpart C of this part, charges for each access element shall be computed and assessed as provided in this subpart.

5. Sec. 69.105 is amended by adding paragraphs (b)(7) and (b)(8), as follows:

§ 69.105 Carrier Common Line.

* * * * *

(b) * * *

(7) The Carrier Common Line charges of telephone companies that are subject to price cap regulation as that term is defined in § 61.3(v) of this chapter, shall be computed at the level of Carrier Common Line access element aggregation selected by such telephone companies pursuant to § 69.3(e)(7). For each such Carrier Common Line access element tariff, the premium originating Carrier Common Line charge shall be one cent per minute. The premium terminating Carrier Common Line charge shall be set at a level that, when aggregated with the one cent originating charge, shall not cause the Actual Price Index for the common line basket to exceed the Price Cap Index for that basket.

(8) If the calculations described in subparagraph (b)(7) of this section result in a per minute charge on premium terminating minutes that is less than one cent, the originating and terminating charges shall be equal, and set at a level that does not cause the API for the common line basket to exceed the PCI.

* * * * *

6. Section 69.111(a) is revised to read as follows:

§ 69.111 Common transport.

(a) A charge that is expressed in dollars and cents per access minute shall be assessed upon all interexchange carriers that use switching or transmission facilities that are apportioned to the Common Transport element for purposes of apportioning investment, or that are equivalent to those facilities for companies subject to price cap regulation as that term is defined in § 61.3(v) of this chapter.

* * * * *

7. Section 69.113(c) is revised to read as follows:

§ 69.113 Non-Premium Charges for MTS-WATS Equivalent Services.

* * * * *

(c) For telephone companies that are not price cap carriers, the non-premium charge for the Local Switching element shall be computed by multiplying a hypothetical premium charge for such element by .45. The hypothetical premium charge for such element shall be computed by dividing the annual revenue requirement for each element by the sum of the projected access minutes for such element for such period and a number that is computed by multiplying the projected non-premium minutes for such element for such period by .45. For telephone companies that are price cap carriers, the non-premium charge for the Local Switching element shall be computed by multiplying the premium charge for such element by .45. Through December 31, 1992, the non-premium charge shall be computed by multiplying the LS1 charge for such element by .45.

* * * * *

8. Section 69.114(a) is revised to read as follows:

§ 69.114(a) Special access.

(a) Appropriate subelements shall be established for the use of equipment or facilities that are assigned to the Special Access element for purposes of apportioning net investment, or that are equivalent to such equipment or facilities for companies subject to price cap regulation as that term is defined in § 61.3(v) of this chapter.

* * * * *

9. Section 69.205(c) is revised to read as follows:

§ 69.205(c) Transitional premium charges.

* * * * *

(c) Except for telephone companies subject to price cap regulation, as that term is defined in § 61.3(v) of this chapter, the charge for an LS2 premium access minute shall be computed by dividing the premium Local Switching revenue requirement by the sum of the projected LS2 premium access minutes and a number that is computed by multiplying the projected LS1 premium access minutes by the applicable LS1 transition factor. For all telephone companies, the charge for an LS1 premium access minute shall be computed by multiplying the charge for an LS2 premium minute by the applicable LS1 transition factor. For telephone companies that are not price cap carriers, the premium Local Switching revenue requirement shall be computed by

subtracting the projected revenues from non-premium charges attributable to the Local Switching element from the revenue requirement for each element.

* * * * *

10. Section 69.301(a) is revised to read as follows:

§ 69.301 General.

(a) For telephone companies that are not subject to price cap regulation as that term is defined in § 61.3(v) of this chapter, for purposes of computing annual revenue requirements for access elements, net investment as defined in § 69.2(z) shall be apportioned among the interexchange category, the billing and collection category, and access elements as provided in this Subpart. Expenses shall be apportioned as provided in Subpart E of this Part. For telephone companies that are price cap carriers, for purposes of calculating annual revenue requirements for access elements, net investment shall be apportioned between common line and all other interstate services. Expenses shall also be apportioned between common line and all other interstate services.

* * * * *

11. Section 69.302(b) is amended by revising the introductory text of paragraph (b) to read as follows:

§ 69.302 Net investment.

* * * * *

(b) Except as provided in § 69.301(a), investment in Accounts 2002, 2003, and, to the extent inclusions are allowed by this Commission, Account 2005, shall be apportioned on the basis of total investment in Account 2001, Telecommunications Plant in Service.

* * * * *

12. Section 69.303 is amended by revising paragraph (a) and the first sentence of paragraph (b) to read as follows:

§ 69.303 Information Origination/Termination Equipment (IOT).

(a) Except as provided in § 69.301(a), investment in public telephones and appurtenances shall be assigned to the Common Line element, if capable of use with the services of more than one interexchange carrier, or the Limited Pay Telephone element, if capable of use with the services of only one interexchange carrier.

(b) Except as provided in § 69.301(a), investment in all other IOT shall be apportioned between the Special Access and Common Line elements on the basis of the relative number of equivalent lines in use, as provided herein. * * *

13. Section 69.304 is amended by revising paragraph (b) and the first sentence of paragraph (c) to read as follows:

§ 69.304 Subscriber line cable and wire facilities.

* * * * *

(b) Except as provided in § 69.301(a), investment in interstate and foreign private lines and interstate WATS access lines shall be assigned to the Special Access element.

(c) Except as provided in § 69.301(a), investment in lines terminating in public telephone which may only access the services of one interexchange carrier (or partnership) shall be assigned to the Limited Pay Telephone element. * * *

14. Section 69.305 is amended by revising paragraph (a) and the first sentence of paragraph (b) to read as follows:

§ 69.305 Carrier cable and wire facilities (C&WF).

(a) Except as provided in § 69.301(a), Carrier C&WF that is not used for "origination" or "termination" as defined in § 69.2(bb) and § 69.2(cc) shall be assigned to the interexchange category.

(b) Except as provided in § 69.301(a), Carrier C&WF, other than WATS access lines, not assigned pursuant to paragraph (a) of this section that is used for interexchange services that use switching facilities for origination and termination that are also used for local exchange telephone service shall be apportioned between the Dedicated Transport and Common Transport elements. * * *

(c) Except as provided in § 69.301(a), all Carrier C&WF that is not apportioned pursuant to paragraphs (a) and (b) of this section shall be assigned to the Special Access element.

15. Section 69.306 is amended by revising paragraph (a) and the first sentences of paragraphs (b), (c), (d), and (e) to read as follows:

§ 69.306 Central office equipment (COE).

(a) Except as provided in § 69.301(a), the Separations Manual categories shall be used for purposes of apportioning investment in such equipment except that any Central office equipment attributable to a Dedicated Transport subelement shall be assigned to the Dedicated Transport element.

(b) Except as provided in § 69.301(a), COE Category 1 (Operator Systems Equipment) shall be apportioned among the interexchange category and the access elements as follows: Category 1 that is used for intercept services shall be assigned to the Local Switching element. * * *

(c) Except as provided in § 69.301(a), COE Category 2 (Tandem Switching equipment) that is deemed to be exchange equipment for purposes of the Modification of Final Judgment in United States v. Western Electric Co. shall be assigned to the Common Transport element. * * *

(d) Except as provided in § 69.301(a) and except as provided in paragraph (a) of this section, COE Category 3 (Local Switching Equipment) shall be assigned to the Local Switching element.

(e) Except as provided in § 69.301(a), COE Category 4 (Circuit Equipment) shall be apportioned among the interexchange category and the Common Line, Limited Pay Telephone, Dedicated Transport, Common Transport, and Special Access elements. * * *

16. Section 69.307 is revised to read as follows:

§ 69.307 General support facilities.

Except as provided in § 69.301(a), General Support Facilities investments shall be apportioned among the interexchange category, the billing and collection category, and Common Line, Limited Pay Telephone, Local Switching, Information, Dedicated Transport, Common Transport, and Special Access elements on the basis of Central Office Equipment, Information Origination/Termination Equipment, and Cable and Wire Facilities excluding Category 1.3, combined.

17. Section 69.308 is revised to read as follows:

§ 69.308 Equal access equipment.

Except as provided in § 69.301(a), Equal Access investment shall be assigned to the Local Switching element unless the telephone company chooses to implement a separate Equal Access element as provided in paragraph 69.4(d), in which case Equal Access investment shall be assigned to the Equal Access element.

18. Section 69.309 is revised to read as follows:

§ 69.309 Other investment.

Except as provided in § 69.301(a), investment that is not apportioned pursuant to §§ 69.302 through 69.308 shall be apportioned among the interexchange category, the billing and collection category, and access elements in the same proportions as the combined investment that is apportioned pursuant to §§ 69.303 through 69.308.

19. Section 69.310 is revised to read as follows:

§ 69.310 Capital Leases.

Except as provided in § 69.301(a), Capital Leases in Account 2680 shall be directly assigned to the appropriate interexchange category or access

elements consistent with the treatment prescribed for similar plant costs or shall be apportioned in the same manner as Account 2001.

20. Section 69.401 is revised to read as follows:

§ 69.401 Direct expenses.

(a) Except as provided in § 69.301(a), Plant Specific Operations Expenses in Accounts 6110 and 6120 shall be apportioned among the interexchange category, the billing and collection category and appropriate access elements on the following basis:

(1) Account 6110 - Apportion on the basis of other investment apportioned pursuant to § 69.309.

(2) Account 6120 - Apportion on the basis of General and Support Facilities investment pursuant to § 69.307.

(b) Except as provided in § 69.301(a), Plant Specific Operations Expenses in Accounts 6210, 6220, and 6230 shall be apportioned among the interexchange category and access elements on the basis of the apportionment of the total COE investment.

(c) Except as provided in § 69.301(a), Plant Specific Operations Expenses in Accounts 6310 and 6410 shall be assigned to the appropriate investment category and shall be apportioned among the interexchange category and access elements in the same proportions as the total associated investment.

(d) Except as provided in § 69.301(a), Plant Non-Specific Operations Expenses in Accounts 6510 and 6530 shall be apportioned among the interexchange category, the billing and collection category, and access elements in the same proportions as the combined investment in COE, IOT, and C&WF apportioned to each element and category.

(e) Except as provided in § 69.301(a), Plant Non-Specific Operations Expenses in Account 6540 shall be assigned to the interexchange category.

(f) Except as provided in § 69.301(a), Plant Non-Specific Operations Expenses in Account 6560 shall be apportioned among the interexchange category, the billing and collection category, and access elements in the same proportion as the associated investment.

(g) Except as provided in § 69.301(a), amortization of embedded customer premises wiring investment shall be deemed to be associated with § 69.303(b) IOT investment for purposes of the apportionment described in paragraph (c) of this section.

21. Section 69.402 is revised to read as follows:

§ 69.402 Operating taxes (Account 7200).

(a) Except as provided in § 69.301(a), federal income taxes, state and local income taxes, state and local gross receipts or gross earnings taxes that are collected in lieu of a corporate income tax shall be apportioned among the interexchange category, the billing and collection category and all access elements based on the approximate net taxable income on which the tax is levied (positive or negative) applicable to each element and category.

(b) Except as provided in § 69.301(a), all other operating taxes shall be apportioned among the interexchange category, the billing and collection category and all access elements in the same manner as the investment apportioned to each element and category pursuant to § 69.309 Other Investment.

22. Section 69.403 is revised to read as follows:

§ 69.403 Marketing expense (Account 6610).

Except as provided in § 69.301(a), Marketing expense shall be apportioned among the interexchange category and all access elements in the same proportions as the combined investment that is apportioned pursuant to § 69.309.

23. Section 69.404 is amended by revising the first sentence to read as follows:

§ 69.404 Telephone operator services expenses in Account 6620.

Except as provided in § 69.301(a), telephone operator services expenses shall be apportioned among the interexchange category, and the Local Switching and Information elements based on the relative number of weighted standard work seconds. * * *

24. Section 69.405 is revised to read as follows:

§ 69.405 Published directory expenses in Account 6620.

Except as provided in § 69.301(a), Published Directory expenses shall be assigned to the Information element.

25. Section 69.406 is amended by revising the first sentence of paragraph (a) to read as follows:

§ 69.406 Local business office expenses in Account 6620.

(a) Except as provided in § 69.301(a), Local business office expenses shall be assigned as follows: * * *

* * * * *

26. Section 69.407 is amended by revising the first sentence of paragraph (b) and paragraph (c) to read as follows:

§ 69.407 Revenue Accounting expenses in Account 6620.

* * * * *

(b) Except as provided in § 69.301(a), Revenue Accounting Expenses that are attributable to carrier's carrier access billing and collection expense shall be apportioned among all carrier's carrier access elements except the Common Line element. * * *

(c) Except as provided in § 69.301(a), all other Revenue Accounting Expenses shall be assigned to the billing and collection category.

27. Section 69.408 is revised to read as follows:

§ 69.408 All other customer services expense in Account 6620.

Except as provided in § 69.301(a), all other customer services expenses shall be apportioned among the interexchange category, the billing and collection category, and all access elements based on the combined expenses in §§ 69.404 through 69.407.

28. Section 69.409 is revised to read as follows:

§ 69.409 Corporate operations expenses (Accounts 6710 and 6720).

Except as provided in § 69.301(a), all corporate operations expenses shall be apportioned among the interexchange category, the billing and collection category and all access elements in accordance with the Big 3 Expense Factor as defined in § 69.2(f).

29. Section 69.410 is revised to read as follows:

§ 69.410 Equal access expenses.

Except as provided in § 69.301(a), Equal Access expenses shall be assigned to the Local Switching element unless the telephone company chooses to implement a separate Equal Access element as provided in § 69.4(d), in which case Equal Access expenses shall be assigned to the Equal Access element.

30. Section 69.411 is revised to read as follows:

§ 69.411 Other expenses.

Except as provided in §§ 69.301(a), 69.412, 69.413, and 69.414, expenses that are not apportioned pursuant to §§ 69.401 through 69.410 shall be apportioned among the interexchange category and all access elements in the same manner as § 69.309 Other investment.

APPENDIX C

A STUDY OF LOCAL EXCHANGE CARRIER POST-DIVESTITURE SWITCHED ACCESS PRODUCTIVITY

by J. Christopher Frentrup and Mark I. Uretsky

This study, using data submitted by the United States Telephone Association (USTA) and by the American Telephone and Telegraph Company (AT&T),[1] examines switched access revenue, cost, and demand data from June 1984 through December 1989 in order to determine the productivity offset, or "X factor", which would have been necessary to give the same prices in 1989 under the Commission's proposed price cap plan as actually occurred under rate of return regulation in that period.[2] We find that this X is approximately 4 percent. However, the value of X is very sensitive both to the time period chosen for the starting point of the analysis and to changes in the formula used for the price cap index (PCI).

The PCI formula that is proposed in the Second Further Notice differs for the common line category and the traffic-sensitive category. There are, however, certain fundamental similarities. Each formula reflects (a) changes in the cost of factors of production through the use of the Gross National Product Price Index (GNP-PI); (b) a productivity offset representing the historical difference between LEC industry productivity improvements and productivity gains in the economy as a whole (the "X" factor); and certain specific cost changes beyond the carriers' control (exogenous changes). As

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1 See Public Notice DA 90-114 (Action in CC Docket 87-313; Common Carrier Bureau Seeks Post-Divestiture Productivity Data for Local Exchange Carriers), released Jan. 29, 1990. See also Letter from Associate General Counsel, USTA to Chief, Common Carrier Bureau, Feb. 9, 1990; Letter from Director, Federal Regulation Division, AT&T, to Chief, Common Carrier Bureau, Feb. 9, 1990; and Letter from Associate General Counsel, USTA, to Chief, Common Carrier Bureau, Feb. 20, 1990 (post-divestiture data).

2 USTA also submitted special access revenue, cost, and price index data. The price index data submitted was a subset of the total special access demand, including only certain services. These services accounted only for approximately 68 percent of special access revenues in the 1985-86 period and only approximately 63 percent in 1989. In addition, there was an important discontinuity in the price index time series, due to the inclusion of WATS data beginning in 1986-87. For these reasons, the price index series appears not to provide sufficient or comparable data for the estimation of special access productivity and we have been unable to analyze special access productivity in this study.

described below, this study adjusts common line rates and traffic sensitive rates to eliminate the effects of exogenous changes. Therefore, for the purposes of estimating X in this study, we can employ PCI formulas derived from Appendix F in the Second Further Notice, which have been simplified by removal of the mathematical terms for exogenous factors.

The basic formula is the one that the Commission proposed for the traffic sensitive category. This formula calculates X and is based on the change in average traffic sensitive price per minute of use (MOU) and GNP-PI:[3]

$$(1)\quad X = \text{GNP-PI} - \%\ \text{Price Change}$$

The formula for the common line category is more complex. In order to account for the fact that productivity estimates, which were derived from long term trends in total Bell System prices, reflect a mixture of per line charges (e.g., connection charges) and per minute charges (e.g., toll charges), a blended "50/50 formula" formula was used in the Second Further Notice. This formula calculates X and based on the change in average common line price per MOU, growth in MOU per line (g) and GNP-PI:

$$(2)\quad X = \text{GNP-PI} - \%\ \text{Price Change} - [g / (2 + g)] * [\%\ \text{Price Change} + 1]$$

In addition, in order to illustrate better that the choice of formula determines the level of X, we also calculate the X on a pure per MOU basis and a pure per line basis.[4] On a pure per MOU basis, we have the same formula as in (1), above. On a pure per line basis, we have

$$(3)\quad X = \text{GNP-PI} - g - (1 + g) * \%\ \text{Price Change}$$

Since the X derived from the proposed price cap formulas for common line and traffic sensitive categories (formulas 1 and 2) will not necessarily be the same, and since the Commission is proposing to adopt a single X for both common line and traffic sensitive categories, we derive a single X such that when used in the common line and traffic sensitive PCI formulas and applied to the observed common line and traffic sensitive rates at the beginning of

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3 Note that the Percentage Change in Price (% Price Change) from one instant of time (t) to another is related to the PCI as follows:

$$\%\ \text{Change Price} = [PCI(t) - PCI(t-1)] / PCI(t-1)$$

4 A pure per MOU basis assumes that X accounts fully for growth in MOU per line (g). A pure per line basis assumes that X accounts for none of the growth in MOU per line and that g must be reflected separately in the equation.

the post-divestiture period results in the observed total switched access rate (the sum of the observed common line and traffic sensitive rates) at the end of the period. This single X is the X that would be used in the Commission's proposed price cap plan.

Both USTA and AT&T have submitted studies of LEC post-divestiture access productivity.[5] These studies have given disparate results, with USTA finding differential productivity[6] of about 2 to 3 percent, and AT&T finding differential productivity of 6 to 7 percent. The Common Carrier Bureau has obtained post-divestiture data from both AT&T and USTA to attempt to determine the cause of this discrepancy. The analysis described in this study is performed on both the data provided by USTA and the data provided by AT&T. We find that both sets of data, if treated consistently, provide approximately the same estimates of productivity. The difference between USTA's and AT&T's studies appears to lie in the different assumptions and methodological treatment given the data, rather than in major differences in the data underlying the various studies.

For each of the five post-divestiture periods -- June 1984 through May 1985 (1984/1985), June 1985 through May 1986 (1985/1986), July 1986 through June 1987 (1986/1987), calendar year 1988 (1988), and April 1989 through December 1989, annualized (1989) -- this study computes common line rates, traffic sensitive rates, and total switched access rates on a per minute of use basis. In addition, common line rates are computed on a per line basis. In computing these rates, revenues are adjusted for the exogenous changes which would have been reflected in the price cap index for both the common line and traffic sensitive baskets. These changes were (1) the transition of the subscriber plant factor (SPF) to 25 percent; (2) the revised separations treatment of local commercial operations expense (Account 645); (3) the direct assignment of closed-end WATS lines to the special access category; (4) the implementation of reserve deficiency amortizations to compensate for inadequate depreciation levels; (5) the effects of the 1986 Tax Reform Act; (6) the revised separations calculation of the dial equipment minutes (DEM) factor; (7) the revised separations treatment of central office equipment category 4 terminations; (8) the revised separations treatment of revenue accounting expenses (Account 662); (9) the adoption of a new Uniform

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5 See Second Further Notice, Appendix E, note 5 for citation of these studies in 1988. See also AT&T's Comments, June 19, 1989 at Appendix A and USTA Reply, Aug. 3, 1989 at Attachment C (July 24, 1989 Report by National Economic Research Associates, Inc., "Analysis of AT&T's Comparison of Interstate Access Charges Under Incentive Regulation and Rate of Return Regulation").

6 Differential productivity is productivity which differs from the average achieved by the economy as a whole.

System of Accounts (Part 32) in place of Part 31, including conformance of Parts 36 and 69 of the Rules to Part 32; and (10) the revised treatment of pension expenses.

In addition, we make several other adjustments to revenue: (1) the effects of the Universal Service Fund (high cost fund) are removed from common line revenue; (2) traffic sensitive revenue and common line revenue are recast to earn 12.00 percent, the currently authorized rate of return;[7] (3) the costs of conversion to equal access are removed;[8] (4) revenue requirements for inside wire and customer premise equipment are removed and (5) demand quantities (minutes of use) are adjusted for exogenous stimulation caused by the introduction of subscriber line charges and by the exogenous changes listed above.

By making these adjustments, revenues and demand quantities for each of the periods under study can be adjusted to a comparable base, enabling us to make an inference regarding the level of productivity. Revenues and demand for each year are adjusted to reflect 1989 conditions and levels of exogenous factors since such conditions and levels best reflect future conditions and levels, and therefore, future productivity.

Common line, traffic sensitive and total switched rates in each of the five periods are computed by dividing revenue, adjusted as described above, by demand, adjusted as described above. The annual growth rates for the adjusted common line, traffic sensitive and total switched access rates are then computed using a logarithmic trend line regression through all five data points.[9] The X factor that yields these annual growth rates, given the growth in the GNP-PI and g, are then computed using formulas (1) through (3) above. For the common line basket, an X is computed using the formula (2), which is derived from the common line PCI formula proposed in the Second Further Notice (the "50/50" formula). For the data provided by USTA, the X

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7 It appears that changes in the cost of capital used in the computation of the GNP-PI have not adequately parallelled the reduction in the LECs' interstate rate of return from 12.75 percent to 12.00 percent in 1987. As a result, equalization of the authorized rates of return appear to be necessary.

8 Despite this adjustment, the problems in estimating the cost effect of migration of Feature Group A and B minutes to Feature Group D minutes remains unsolved. See Second Further Notice at Appendix E.

9 Application of a regression technique (finding the line which best fits the data points scattered on a graph) allows us, in essence, to compute the average price change per year for the post-divestiture period, despite the fact the year-to-year price changes varied widely.

is 4.79 percent; for the data provided by AT&T, the X is 4.80 percent. For the traffic sensitive basket, the X is computed using formula (1), which is derived from the traffic sensitive formula proposed in the Second Further Notice (the "GNP-PI - X" formula). For the data provided by USTA, the X is 2.65 percent; for the data provided by AT&T, the X is 2.92 percent.

These estimates measure the X that would be used in the common line formula and traffic sensitive formula for the PCI if a different X were used in each basket. The current proposal, however, is to use one X for both baskets. As discussed above, this X is given by the X for total switched access. For total switched access, the X which results from the data provided by USTA is 3.80 percent; for the data provided by AT&T, the X is 3.98 percent.

The growth rates and resulting X factors for each of the three rates are also computed in two additional ways. First, an annual growth rate is computed which simply compares adjusted rates in 1989 to adjusted rates in 1984/1985. Use of a 1984/85 starting point corresponds to the method used by USTA in its studies of post divestiture productivity, and gives a relatively lower growth rate than the trend method used above. Second, a growth rate is computed which compares adjusted rates in 1989 to adjusted rates in 1985/1986. Use of a later starting point corresponds to the method used by AT&T in its studies of LEC productivity, and gives a relatively higher growth rate that either the trend analysis or the USTA method. The results of using these two methods of computing the growth rate in the rates makes it appear that a large portion of the difference in the X factors computed by USTA and AT&T can be explained simply by the different starting points of their analyses.

TREND LINE REGRESSION
COMPUTATION OF X FACTORS FROM USTA DATA

Annual growth rate of CL minutes per line, annual growth rate of GNPPI, and annual change in nominal prices are computed in Chart UGRO. Beginning trend line CL/MOU rate, beginning trend line TS/MOU rate, and ending trend line total switched rate are computed in Chart UTREND. Annual growth rate of CL minutes per line is 6.93%, and annual growth rate of GNPPI is 3.85%. Computed are X in proposed 50/50 CL formula, X in GNPPI-X formula, and the singular annual X. Singular annual X is the X which, when used in the 50/50 CL formula and applied to the beginning trend line CL/MOU rate, and in the GNPPI-X TS formula and applied to the beginning trend line TS/MOU rate, will give ending CL/MOU and TS/MOU rates which sum to the ending trend line Total Switched/MOU rate.

	CL	TS	TOT SW
Annual change in nominal price/MOU	-4.15%	1.20%	na
Annual change in nominal price/Line	2.52%	na	na
X in proposed 50/50 CL formula	4.79%	na	na
X in per MOU (GNPPI-X) formula	8.00%	2.65%	na
X in per Line formula	1.36%	na	na
Beginning trend line CL/MOU rate	$0.0390	na	na
Beginning trend line TS/MOU rate	na	$0.0270	na
Ending trend line Tot Switch/MOU rate	na	na	$0.0605
Singular annual X	na	na	3.80%

1984 TO 1989 END TO END
COMPUTATION OF X FACTORS FROM USTA DATA

Annual growth rate of CL minutes per line, annual growth rate of GNPPI, and annual change in nominal prices are computed in Chart UGRO. The 1984 CL/MOU rate, 1984 TS/MOU rate, and 1989 total switched rate are reported in Chart UGRO. Annual growth rate of CL minutes per line is 6.56%, and annual growth rate of GNPPI is 3.62%. Computed are X in proposed 50/50 CL formula, X in GNPPI-X formula, and the singular annual X. Singular annual X is the X which, when used in the 50/50 CL formula and applied to the beginning CL/MOU rate, and in the GNPPI-X TS formula and applied to the beginning TS/MOU rate, will give ending CL/MOU and TS/MOU rates which sum to the ending Total Switched/MOU rate.

	CL	TS	TOT SW
Annual change in nominal price/MOU	-3.56%	2.19%	na
Annual change in nominal price/Line	2.78%	na	na
X in proposed 50/50 CL formula	4.12%	na	na
X in per MOU (GNPPI-X) formula	7.18%	1.42%	na
X in per Line formula	0.86%	na	na
Beginning CL/MOU rate	$0.0363	na	na
Beginning TS/MOU rate	na	$0.0251	na
Ending Tot Switch/MOU rate	na	na	$0.0584
Singular annual X	na	na	2.88%

1985 TO 1989 END TO END
COMPUTATION OF X FACTORS FROM USTA DATA

Annual growth rate of CL minutes per line, annual growth rate of GNPPI, and annual change in nominal prices are computed in Chart UGRO. The 1985 CL/MOU rate, 1985 TS/MOU rate, and 1989 total switched rate are reported in Chart UGRO. Annual growth rate of CL minutes per line is 7.41%, and annual growth rate of GNPPI is 3.58%. Computed are X in proposed 50/50 CL formula, X in GNPPI-X formula, and the singular annual X. Singular annual X is the X which, when used in the 50/50 CL formula and applied to the beginning CL/MOU rate, and in the GNPPI-X TS formula and applied to the beginning TS/MOU rate, will give ending CL/MOU and TS/MOU rates which sum to the ending Total Switched/MOU rate.

	CL	TS	TOT SW
Annual change in nominal price/MOU	-5.87%	-1.59%	na
Annual change in nominal price/Line	1.10%	na	na
X in proposed 50/50 CL formula	6.09%	na	na
X in per MOU (GNPPI-X) formula	9.45%	5.16%	na
X in per Line formula	2.47%	na	na
Beginning CL/MOU rate	$0.0383	na	na
Beginning TS/MOU rate	na	$0.0295	na
Ending Tot Switch/MOU rate	na	na	$0.0584
Singular annual X	na	na	5.63%

COMPUTATION OF GROWTH RATES

This chart presents the adjusted TS/MOU and CL/MOU rates as computed in Chart URATE. The Total Switched/MOU rates are the sum of the TS/MOU and CL/MOU rates. CL MOU per Line is computed as the CL MOU adjusted for exogenous changes computed in Chart URATE and reported in this chart divided by the Subscriber Lines reported on this chart. The numbers on the columns on this chart correspond to the numbers on the regressions on Chart UREG.

	(1) USTA TS/MOU AT 1989	(2) USTA CL/MOU AT 1989	(3) USTA TOT SW/MOU AT 1989	(4) USTA CL/LINE AT 1989	(5) CL MOU per Line
6/84 thru 5/85	$0.0251	$0.0363	$0.0614	$59.05	1,627
6/85 thru 5/86	$0.0295	$0.0383	$0.0678	$64.51	1,683
7/86 thru 6/87	$0.0283	$0.0394	$0.0677	$70.80	1,799
Calendar 1988	$0.0282	$0.0333	$0.0615	$68.50	2,058
4/89 thru 12/89, annualized	$0.0278	$0.0306	$0.0584	$67.19	2,194
6/84 - 12/89 ann growth	2.1937%	-3.5630%	-1.0583%	2.7808%	6.5562%
6/85 - 12/89 ann growth	-1.5878%	-5.8731%	-3.9447%	1.1037%	7.4119%
Log Trend annual growth	1.1953%	-4.1522%	-1.8153%	2.5229%	6.9320%
Log Trend R-square	0.1414	0.5995	0.2774	0.4612	0.9825

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COMPUTATION OF GROWTH RATES

This chart presents the adjusted TS/MOU and CL/MOU rates as computed in Chart URATE. The Total Switched/MOU rates are the sum of the TS/MOU and CL/MOU rates. CL MOU per Line is computed as the CL MOU adjusted for exogenous changes computed in Chart URATE and reported in this chart divided by the Subscriber Lines reported on this chart. The numbers on the columns on this chart correspond to the numbers on the regressions on Chart UREG.

	Growth in GNP-PI	Subscr Lines excl WATS	CL MOU adj for exog	Time Trend
6/84 thru 5/85	4.0695%	109,965,483	178,867,567	7
6/85 thru 5/86	4.0681%	113,316,244	190,706,779	19
7/86 thru 6/87	3.3636%	116,063,662	208,771,334	32
Calendar 1988	3.4002%	121,654,374	250,350,618	50
4/89 thru 12/89, annualized	4.3442%	126,432,081	277,418,023	63.5
6/84 - 12/89 ann growth	3.6178%			
6/85 - 12/89 ann growth	3.5763%			
Average annual growth	3.8491%			

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LOGARITHMIC TREND REGRESSIONS

This chart presents the regression results of logarithmic time trend regressions on the TS/MOU rate, the CL/MOU rate, the Total Switched/MOU rate, and the CL MOU per line data presented in Chart UGRO. The number of the regression output on this chart corresponds with the number on the data on Chart UGRO.

(1) USTA TS/MOU

Regression Output:		
Constant		0
Std Err of Y Est		0.064330131
R Squared		0.141429858
No. of Observations		5
Degrees of Freedom		3
X Coefficient(s)	-3.6188397	0.000990671
Std Err of Coef.	0.05625075	0.001409244

(2) USTA CL/MOU

Regression Output:		
Constant		0
Std Err of Y Est		0.075994540
R Squared		0.599494378
No. of Observations		5
Degrees of Freedom		3
X Coefficient(s)	-3.2192337	-0.00352779
Std Err of Coef.	0.06645020	0.001664770

(3) USTA TOT SW/MOU

Regression Output:		
Constant		0
Std Err of Y Est		0.064890160
R Squared		0.277402294
No. of Observations		5
Degrees of Freedom		3
X Coefficient(s)	-2.7083476	-0.00152552
Std Err of Coef.	0.05674045	0.001421513

LOGARITHMIC TREND REGRESSIONS

This chart presents the regression results of logarithmic time trend regressions on the TS/MOU rate, the CL/MOU rate, the Total Switched/MOU rate, and the CL MOU per line data presented in Chart UGRO. The number of the regression output on this chart corresponds with the number on the data on Chart UGRO.

(4) USTA CL/LINE

Regression Output:		
Constant		0
Std Err of Y Est		0.059203319
R Squared		0.461235019
No. of Observations		5
Degrees of Freedom		3
X Coefficient(s)	4.11659346	0.002078452
Std Err of Coef.	0.05176783	0.001296934

(5) USTA CL MOU PER LINE

Regression Output:		
Constant		0
Std Err of Y Est		0.019699262
R Squared		0.982501839
No. of Observations		5
Degrees of Freedom		3
X Coefficient(s)	7.33604805	0.005600838
Std Err of Coef.	0.01722518	0.000431540

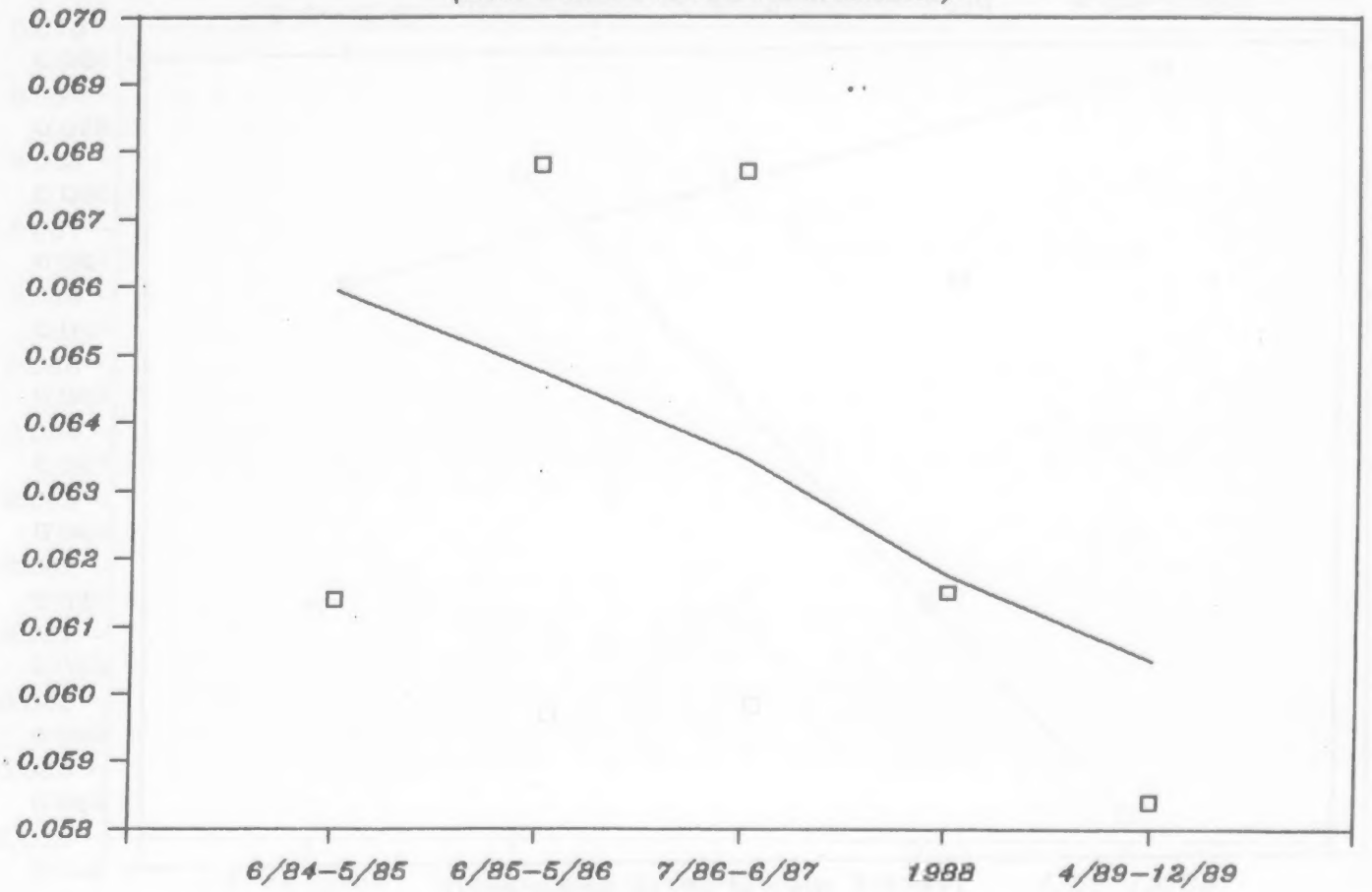
TREND LINE ESTIMATES OF ACCESS RATES AND DEMAND

This chart presents the trend line estimates of the TS/MOU, CL/MOU, and Total Switched/MOU rates, and the trend line estimate of CL MOU per Line, using the regression output from Chart UREG.

		Est. USTA TS/MOU at 1989	Est. USTA CL/MOU at 1989	Est. USTA TOT SW/MOU at 1989	Est. USTA CL/LINE at 1989	Est. CL MOU per Line
1.	6/84 thru 5/85	$0.0270	$0.0390	$0.0659	$62.25	1,596
2.	6/85 thru 5/86	$0.0273	$0.0374	$0.0647	$63.82	1,707
3.	7/86 thru 6/87	$0.0277	$0.0357	$0.0635	$65.57	1,836
4.	Calendar 1988	$0.0282	$0.0335	$0.0618	$68.07	2,031
5.	4/89 thru 12/89, annualized	$0.0286	$0.0320	$0.0605	$70.01	2,190

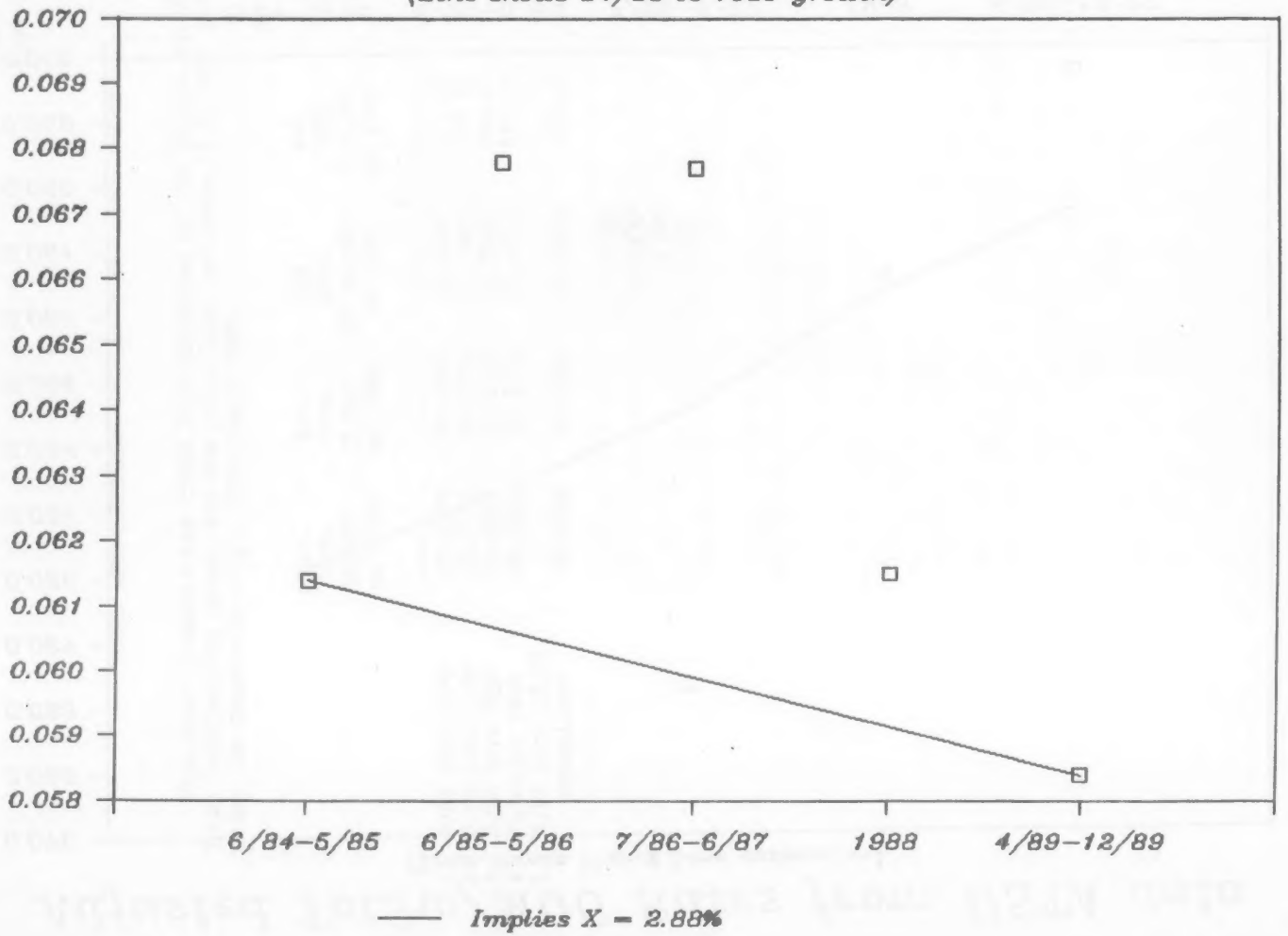
Adjusted TotSw/MOU Rates from USTA data

(Line shows Trend Line estimates)



Adjusted TotSw/MOU Rates from USTA data

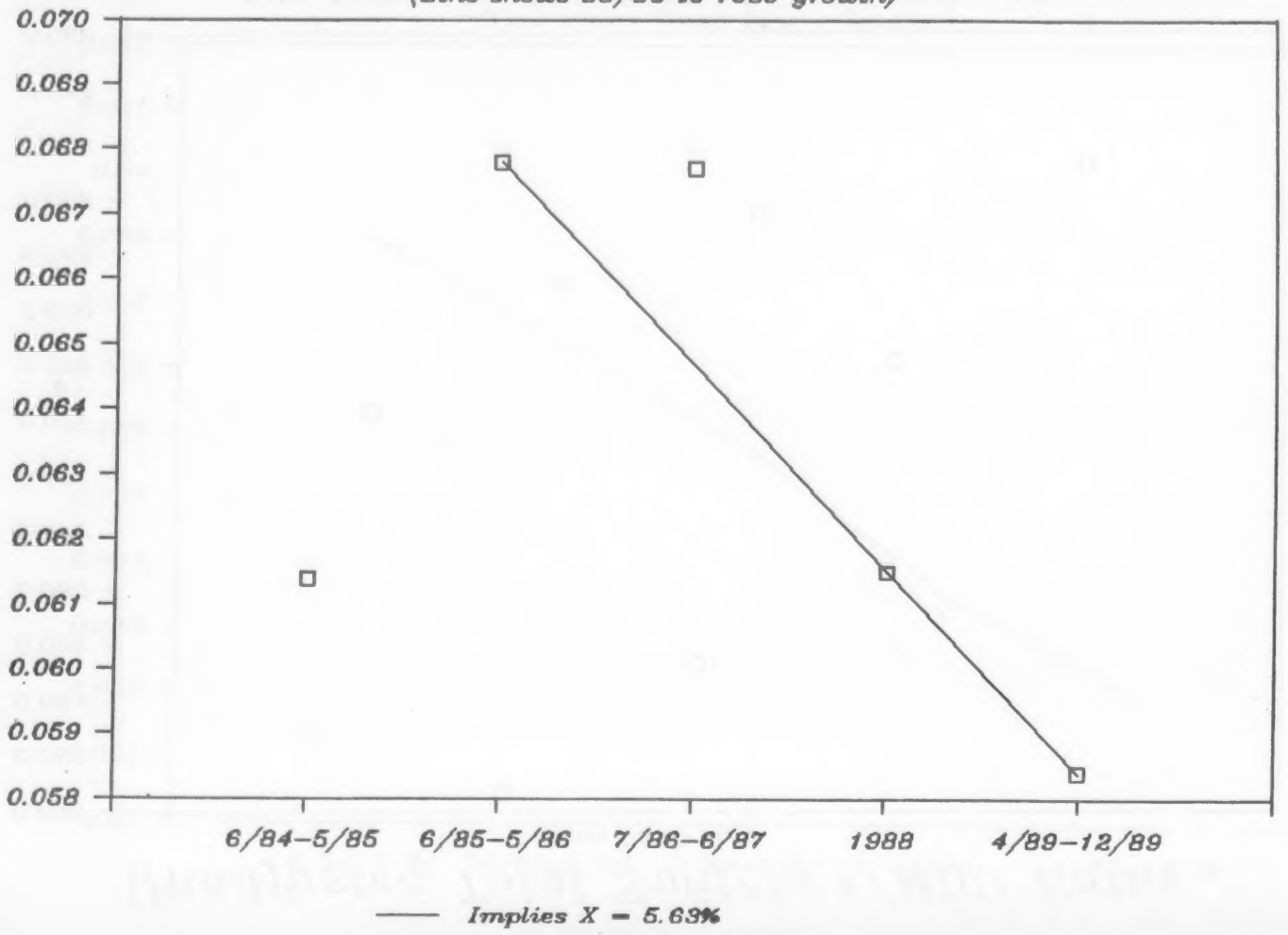
(Line shows 84/85 to 1989 growth)



2334

Adjusted TotSw/MOU Rates from USTA data

(Line shows 85/86 to 1989 growth)



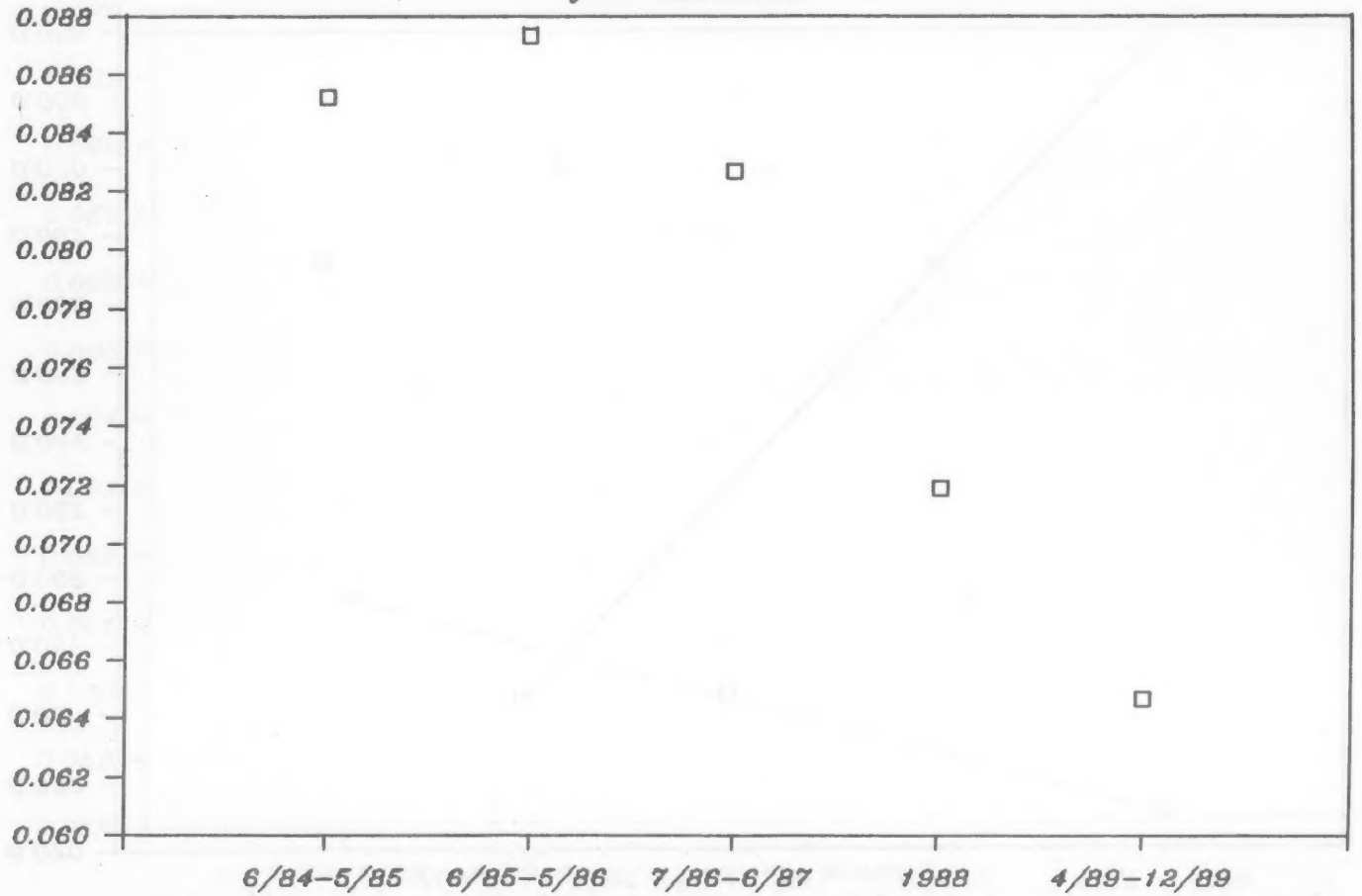
2335

Adjusted TotSw/MOU Rates from USTA data

CL 50/50 X = 4.79%

Unadjusted Total Switched/MOU Rates

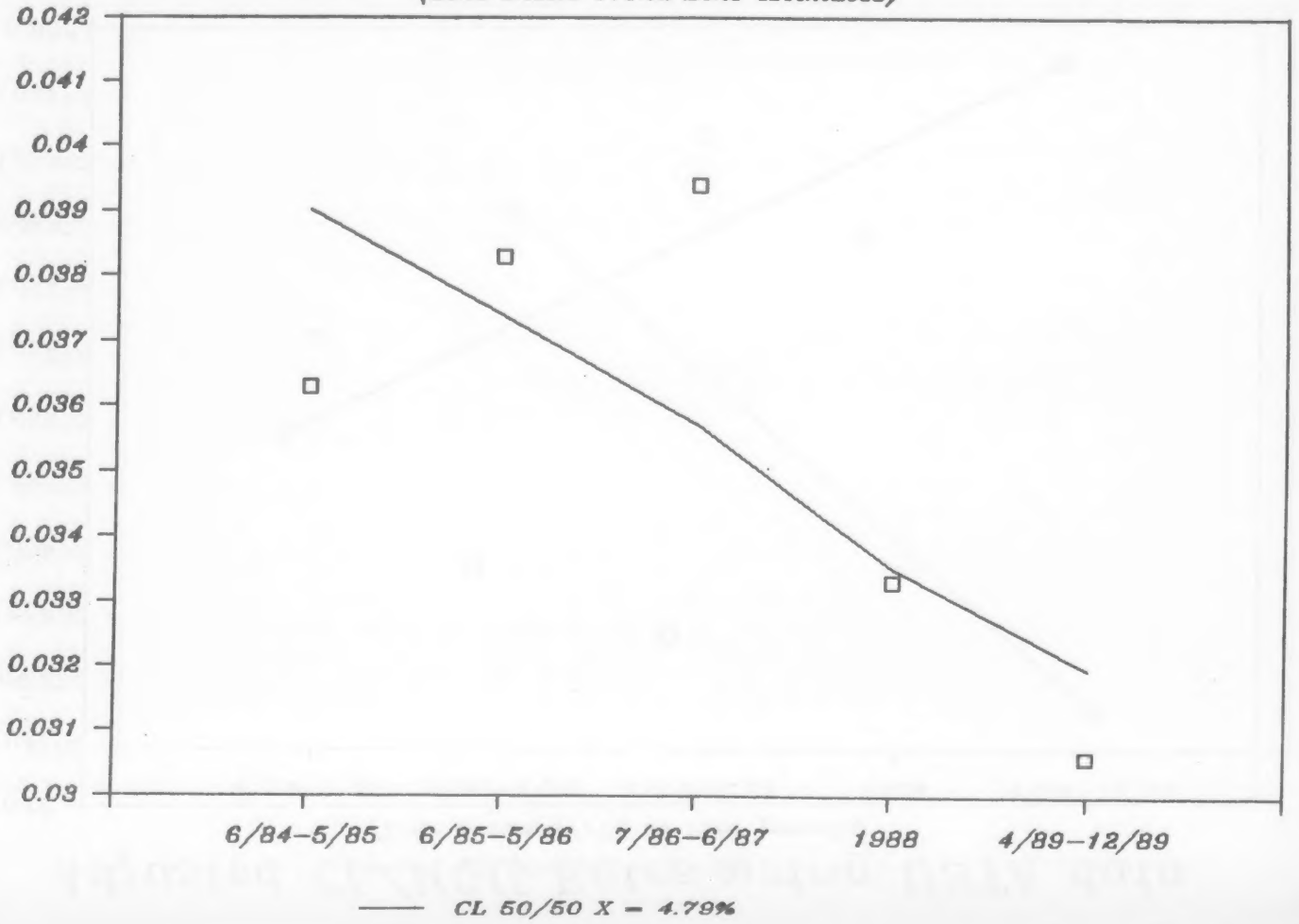
from USTA data



2336

Adjusted CL/MOU Rates using USTA data

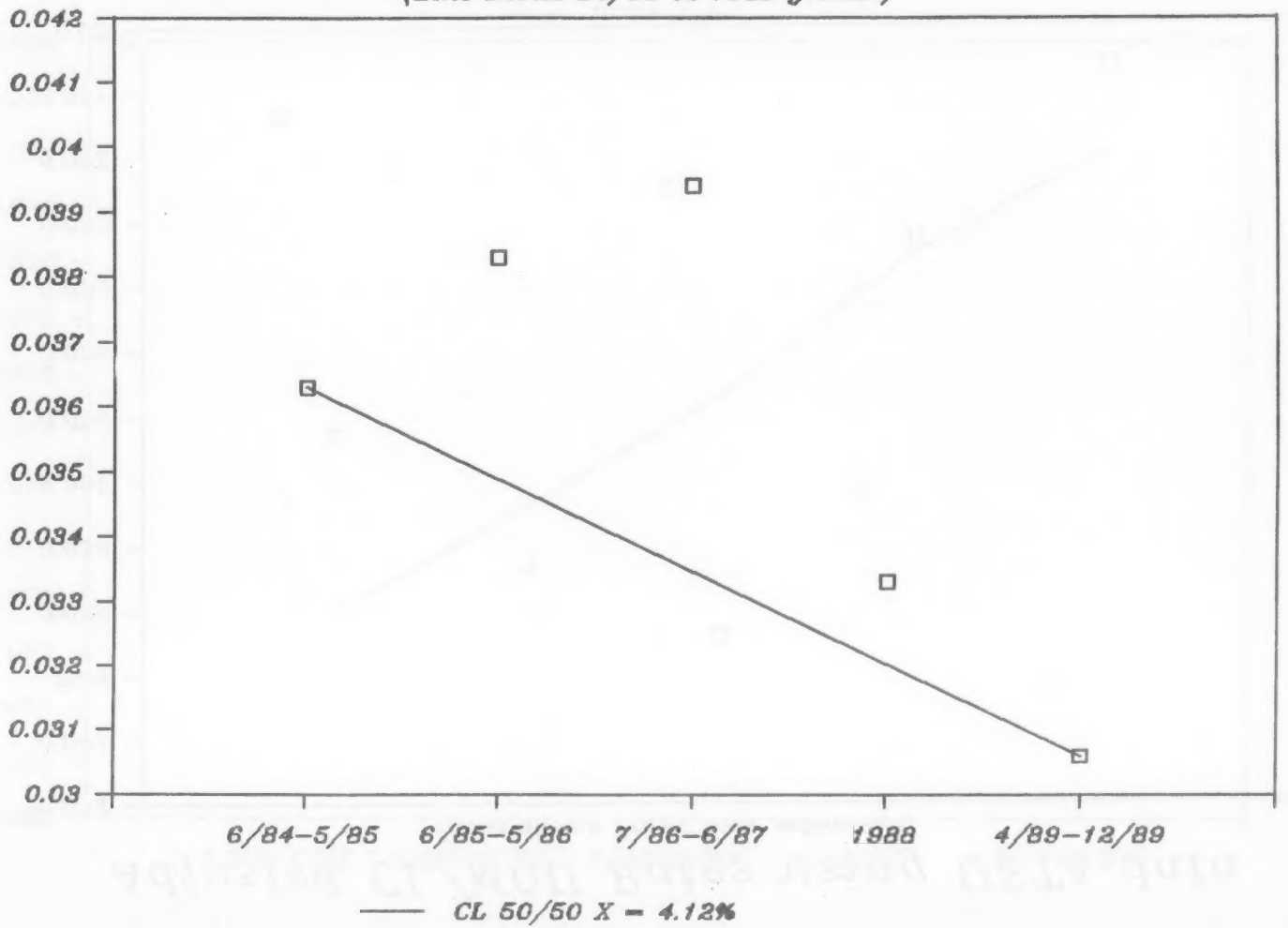
(Line shows Trend Line estimates)



2337

Adjusted CL/MOU Rates using USTA data

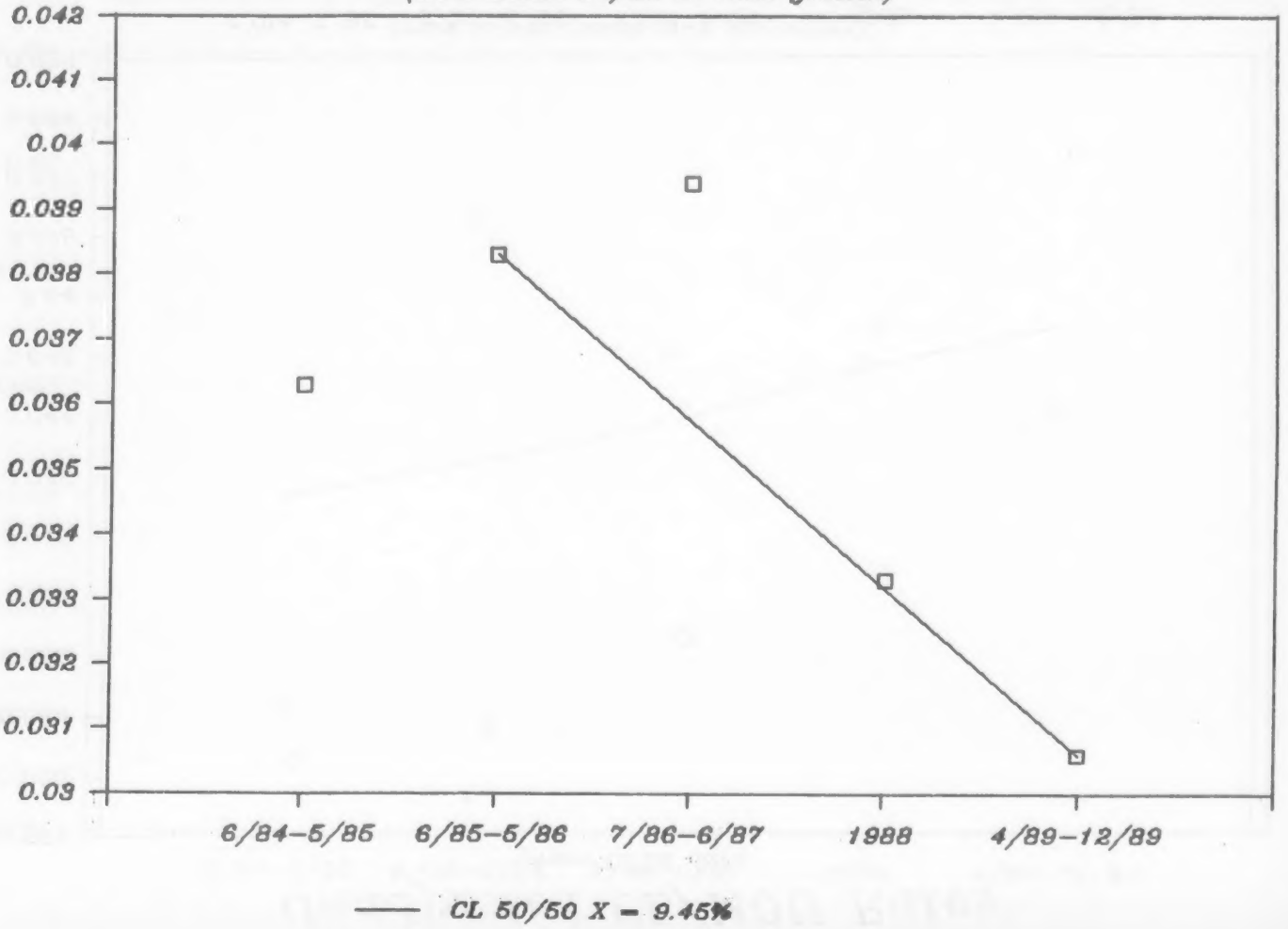
(Line shows 84/85 to 1989 growth)



2338

Adjusted CL/MOU Rates using USTA data

(Line shows 85/86 to 1989 growth)



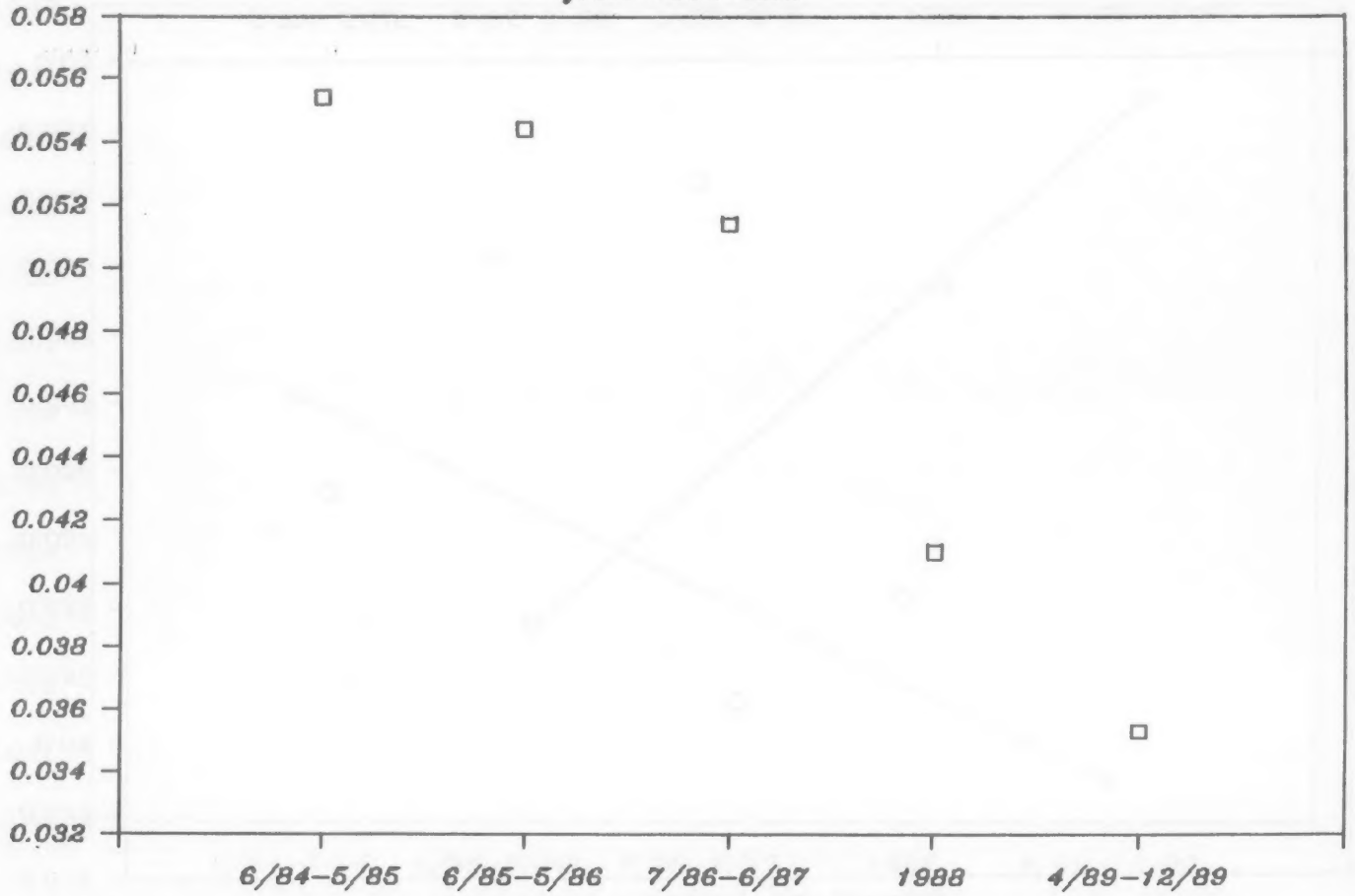
2339

Adjusted CL/MOU Rates using USTA data

—— *Implies TS X–2.65%*

Unadjusted CL/MOU Rates

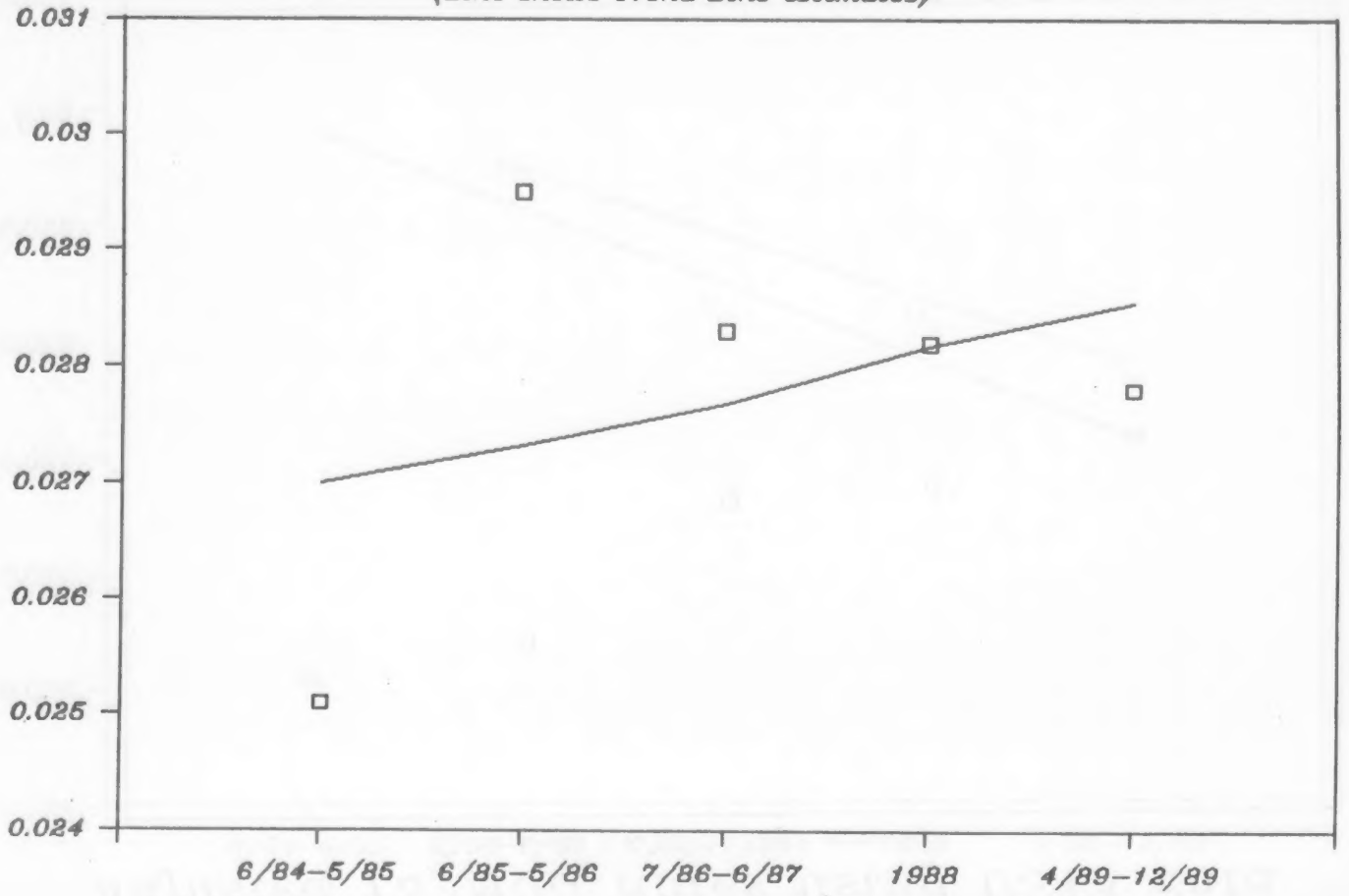
from USTA data



2340

Adjusted TS/MOU Rates using USTA data

(Line shows Trend Line estimates)

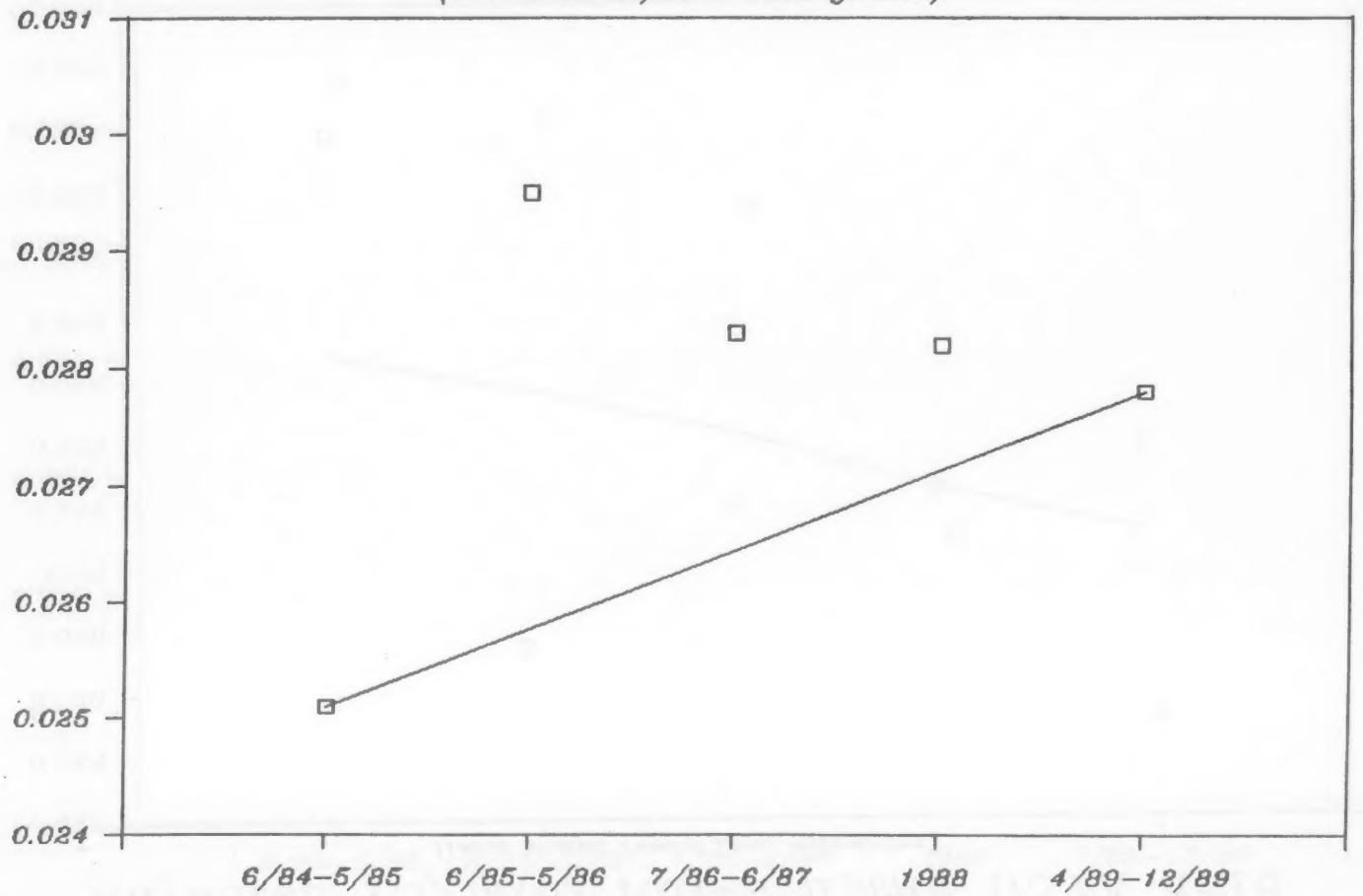


2341

Unadjusted CL/MOU Rates

Adjusted TS/MOU Rates using USTA data

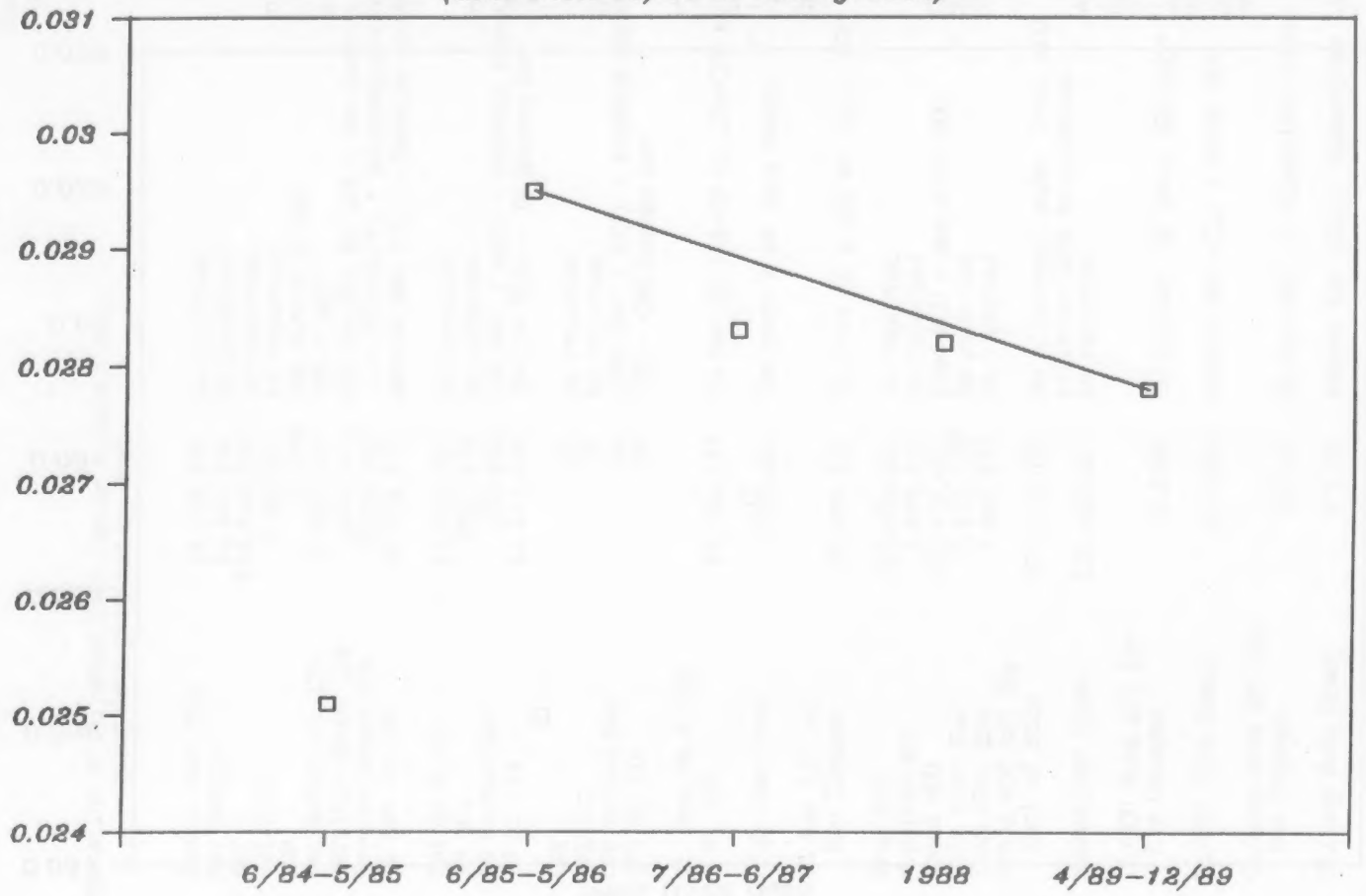
(Line show 84/85 to 1989 growth)



2342

Adjusted TS/MOU Rates using USTA data

(Line show 85/86 to 1989 growth)

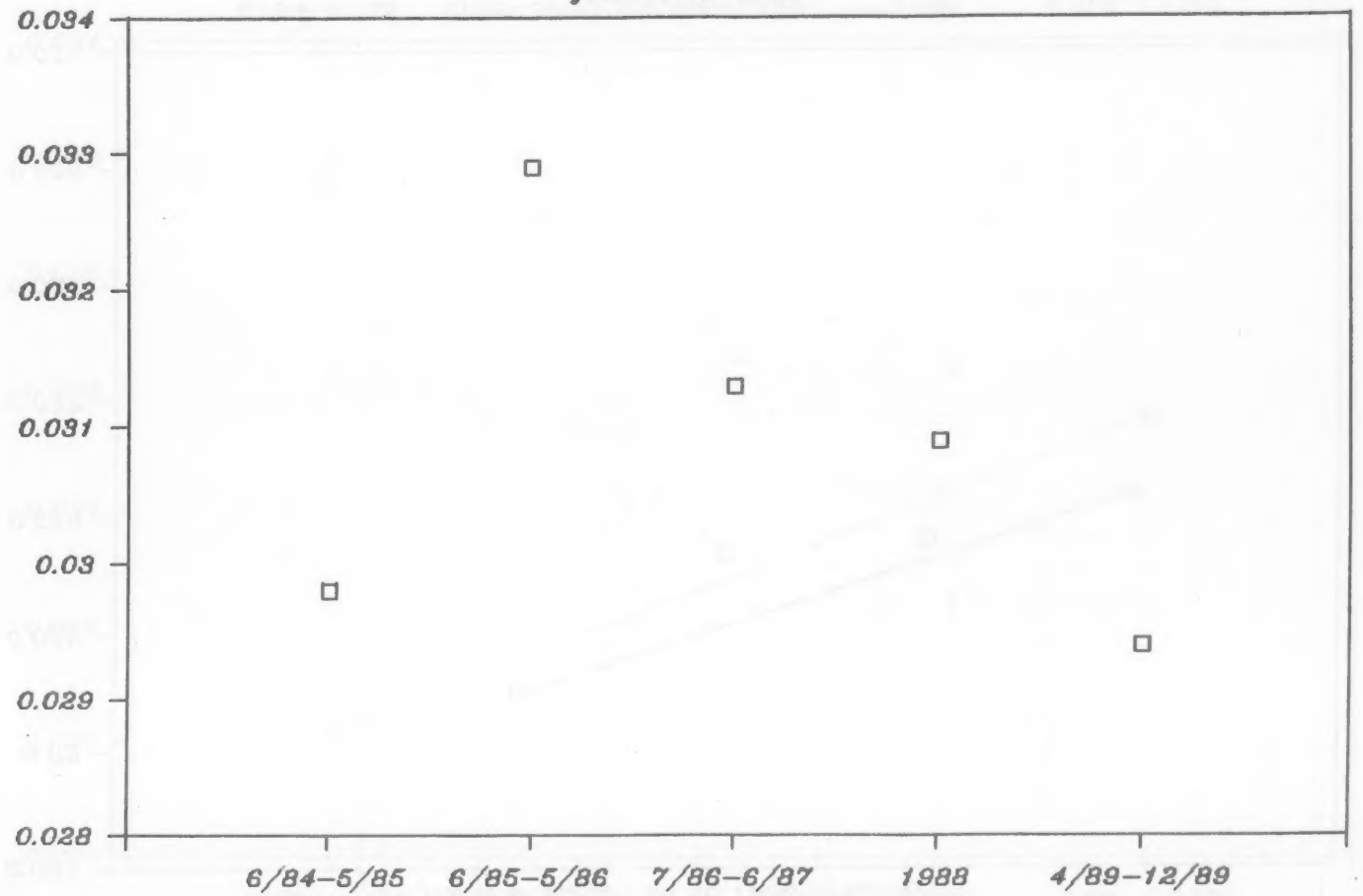


2343

Adjusted TS/MOU Rates using USTA data

Unadjusted TS/MOU Rates

from USTA data



2344

Computation of Adjusted 1989 Common Line/MOU Rate
using data provided by USTA

Access Rev (CL)	$9,779,379	As reported
Net Return	$1,901,114	As reported
ANI	$16,546,309	As reported
FIT/SLIT	0.603354	As reported
ROR	11.49%	Net Return / ANI
Net Return at 12%	$1,985,557	12% * ANI
Earnings above 12%	($84,443)	Net Return at 12% - Net Return
Revenue above 12%	($135,392)	(1 + FIT/SLIT) * Earnings above 12%
CL Rev at 12%	$9,914,771	Access Rev (CL) - Revenue above 12%
Inside Wire	$1,208,731	As reported
IW ANI	$721,419	As reported
IW Excess Rev	($5,903)	(IW ANI / ANI) * Revenue above 12%
IW at 12%	$1,214,634	Inside Wire - IW Excess Rev
CPE	$0	As reported
CPE ANI	$0	As reported
CPE Excess Rev	$0	(CPE ANI / ANI) * Revenue above 12%
CPE at 12%	$0	CPE - CPE Excess Rev
CL less IW & CPE at 12%	$8,700,137	CL Rev at 12%-IW at 12%-CPE at 12%
High Cost Fund	$205,301	See page 2 of this chart
CL Rev Adj for Exo Changes	$8,494,836	CL less IW & CPE at 12% - HCF
Prem MOU	269,608,911	As reported
Non-Prem MOU	7,809,112	As reported
Total MOU	277,418,023	Prem MOU + Non-Prem MOU
Stim MOU: SLC	29,679,743	As reported
Stim MOU: Exo	7,046,978	As reported
Total MOU Adj for Incl of Stim	277,418,023	No adjustment made; Total MOU reflects 1989 stimulation
Subscriber Lines	126,432,081	As reported
CL/MOU Rate Adj for Exo Changes	$0.0306	CL Rev Adj / Total MOU Adj
CL/MOU Rate Unadj	$0.0353	Access Rev (CL) / Total MOU
CL/Loop Rate Adj for Exo Changes	$67.19	CL Rev Adj / Subscriber Lines
CL/Loop Rate Unadj	$77.35	Access Rev (CL) / Subscriber Lines

Unadjusted TS/MOU Rates

Computation of Adjusted 1988 Common Line/MOU Rate
using data provided by USTA

Access Rev (CL)	$10,012,595	
Net Return	$2,030,613	
ANI	$16,589,979	
FIT/SLIT	0.607716	
ROR	12.24%	
Net Return at 12%	$1,990,797	
Earnings above 12%	$39,816	
Revenue above 12%	$64,012	
CL Rev at 12%	$9,948,583	
Inside Wire	$1,354,704	
IW ANI	$985,445	
IW Excess Rev	$3,802	
IW at 12%	$1,350,902	
CPE	$0	
CPE ANI	$0	
CPE Excess Rev	$0	
CPE at 12%	$0	
CL less IW & CPE at 12%	$8,597,681	
SPF Phase-Down	($120,826)	All exogenous changes except the HCF are cumulated for all later years. Thus the effect in 1988 is the amount reported for 1989. The effect in 1986/7 will be the sum of the 1989 and 1988 amounts, and so on. This adjusts exogenous changes to 1989 levels. The High Cost Fund, conversely, is cumulated over all previous years. Thus, the 1988 amount is the sum of the reported 1984/5, 1985/6, 1986/7, and 1988 amounts. This amount is subtracted from CL revenue because, beginning in 1989, HCF is no longer recovered in the CCL rate.
SPF Phase-Down less CPE and IW	($104,419)	
High Cost Fund	$205,301	
Reserve Def Amort	$32,062	
COE Cat 3 - Dems	$14,017	
COE Cat 3 - Dems less CPE and IW	$12,114	
COE Cat 4 - Terms	$9,083	
COE Cat 4 - Terms less CPE and IW	$7,850	
Acct 662	($7,083)	All exogenous changes except HCF and RDA are recast to remove the portion of the exogenous change reflected in the CPE and IW categories.
Acct 662 less CPE and IW	($6,121)	
CL Rev Adj for Exo Changes	$8,333,865	

Computation of Adjusted 1988 Common Line/MOU Rate
using data provided by USTA

Prem MOU	235,269,424	
Non-Prem MOU	9,197,903	
Total MOU	244,467,327	
Stim MOU: SLC	21,732,255	
Stim MOU: Exo	5,527,785	Each of the two types of exogenous
Stim MOU: SLC at 89	26,783,919	stimulation in each year prior to
Stim MOU: Exo at 89	6,359,411	1989 is recast to the 1989 level
Total MOU Adj for Exo Changes	250,350,618	by multiplying the ratio of that type of 1989 Stim Mou to 1989 Total MOU less both types of 1989 Stim
Subscriber Lines	121,654,374	MOU, by the year's Total MOU less both types of the year's Stim MOU.
CL/MOU Rate Adj for Exo Changes	$0.0333	
CL/MOU Rate Unadj	$0.0410	
CL/Loop Rate Adj for Exo Changes	$68.50	
CL/Loop Rate Unadj	$82.30	

Computation of Adjusted 7/86 - 6/87 Common Line/MOU Rate
using data provided by USTA

Access Rev (CL)	$10,213,735
Net Return	$2,066,210
ANI	$17,655,505
FIT/SLIT	0.867188
ROR	11.70%
Net Return at 12%	$2,118,661
Earnings above 12%	($52,451)
Revenue above 12%	($97,935)
CL Rev at 12%	$10,311,670
Inside Wire	$1,116,361
IW ANI	$944,570
IW Excess Rev	($5,240)
IW at 12%	$1,121,601
CPE	$222,659
CPE ANI	$273,660
CPE Excess Rev	($1,518)
CPE at 12%	$224,177
CL less IW & CPE at 12%	$8,965,893

Computation of Adjusted 7/86 - 6/87 Common Line/MCU Rate
using data provided by USTA

SPF Phase-Down	($293,064)
SPF Phase-Down less CPE and IW	($254,816)
High Cost Fund	$89,309
Reserve Def Amort	$110,062
Tax Reform	($453,607)
Tax Reform less CPE and IW	($394,407)
COE Cat 3 - Dems	$22,044
COE Cat 3 - Dems less CPE and IW	$19,167
COE Cat 4 - Terms	$12,008
COE Cat 4 - Terms less CPE and IW	$10,441
Acct 662	($26,727)
Acct 662 less CPE and IW	($23,239)
Conformance	($95,687)
Conformance less CPE and IW	($83,199)
FASB 87	($49,261)
FASB 87 less CPE and IW	($42,832)
CL Rev Adj for Exo Changes	$8,217,761

Computation of Adjusted 7/86 - 6/87 Common Line/MOU Rate
using data provided by USTA

Prem MOU	186,034,212
Non-Prem MOU	12,844,050
Total MOU	198,878,262
Stim MOU: SLC	15,581,387
Stim MOU: Exo	2,164,288
Stim MOU: SLC at 89	22,335,533
Stim MOU: Exo at 89	5,303,213
Total MOU Adj for Exo Changes	208,771,334
Subscriber Lines	116,063,662
CL/MOU Rate Adj for Exo Changes	$0.0394
CL/MOU Rate Unadj	$0.0514
CL/Loop Rate Adj for Exo Changes	$70.80
CL/Loop Rate Unadj	$88.00

Computation of Adjusted 6/85 - 5/86 Common Line/MOU Rate
using data provided by USTA

Access Rev (CL)	$10,878,568
Net Return	$2,404,629
ANI	$18,387,193
FIT/SLIT	0.967797
ROR	13.08%
Net Return at 12%	$2,206,463
Earnings above 12%	$198,166
Revenue above 12%	$389,950
CL Rev at 12%	$10,488,618
Inside Wire	$1,627,434
IW ANI	$1,507,750
IW Excess Rev	$31,976
IW at 12%	$1,595,458
CPE	$921,415
CPE ANI	$1,167,587
CPE Excess Rev	$24,762
CPE at 12%	$896,653
CL less IW & CPE at 12%	$7,996,507

Computation of Adjusted 6/85 - 5/86 Common Line/MOU Rate
using data provided by USTA

SPF Phase-Down	($408,431)	
SPF Phase-Down less CPE and IW	($311,387)	
Acct 645	$20,255	
Acct 645 less CPE and IW	$15,442	
High Cost Fund	$23,040	
WATS DA: 1986-7	($128,309)	assume all loop, no inside wire
Reserve Def Amort	$238,802	
Tax Reform	($489,264)	
Tax Reform less CPE and IW	($373,014)	
COE Cat 3 - Dems	$22,044	
COE Cat 3 - Dems less CPE and IW	$16,806	
COE Cat 4 - Terms	$12,008	
COE Cat 4 - Terms less CPE and IW	$9,155	
Acct 662	($26,727)	
Acct 662 less CPE and IW	($20,377)	
Conformance	($95,687)	
Conformance less CPE and IW	($72,952)	
FASB 87	($49,261)	
FASB 87 less CPE and IW	($37,557)	
CL Rev Adj for Exo Changes	$7,310,077	

Computation of Adjusted 6/85 - 5/86 Common Line/MOU Rate
using data provided by USTA

Prem MOU	179,382,372
Non-Prem MOU	20,564,460
Total MOU	199,946,832
WATS DA	24,541,446
Tot MOU less WATS DA	175,405,386
Stim MOU: SLC	9,267,686
Stim MOU: Exo	678,144
Stim MOU: SLC at 89	20,402,886
Stim MOU: Exo at 89	4,844,337
Total MOU Adj for Exo Changes	190,706,779
Subscriber Lines	113,316,244
CL/MOU Rate Adj for Exo Changes	$0.0383
CL/MOU Rate Unadj	$0.0544
CL/Loop Rate Adj for Exo Changes	$64.51
CL/Loop Rate Unadj	$96.00

Computation of Adjusted 6/84 - 5/85 Common Line/MOU Rate
using data provided by USTA

Access Rev (CL)	$10,172,842
Net Return	$2,162,478
ANI	$18,510,144
FIT/SLIT	0.927645
ROR	11.68%
Net Return at 12%	$2,221,217
Earnings above 12%	($58,739)
Revenue above 12%	($113,228)
CL Rev at 12%	$10,286,070
Inside Wire	$1,846,371
IW ANI	$2,398,915
IW Excess Rev	($14,674)
IW at 12%	$1,861,045
CPE	$1,329,590
CPE ANI	$1,893,588
CPE Excess Rev	($11,583)
CPE at 12%	$1,341,173
CL less IW & CPE at 12%	$7,083,852

Computation of Adjusted 6/84 - 5/85 Common Line/MOU Rate
using data provided by USTA

SPF Phase-Down	($523,798)	
SPF Phase-Down less CPE and IW	($360,731)	
Acct 645	$124,571	
Acct 645 less CPE and IW	$85,790	
High Cost Fund	$0	
WATS DA: 1986-7	($122,668)	assume all loop, no inside wire
Reserve Def Amort	$238,802	
Tax Reform	($489,264)	
Tax Reform less CPE and IW	($336,948)	
COE Cat 3 - Dems	$22,044	
COE Cat 3 - Dems less CPE and IW	$15,181	
COE Cat 4 - Terms	$12,008	
COE Cat 4 - Terms less CPE and IW	$8,270	
Acct 662	($26,727)	
Acct 662 less CPE and IW	($18,406)	
Conformance	($95,687)	
Conformance less CPE and IW	($65,898)	
FASB 87	($49,261)	
FASB 87 less CPE and IW	($33,925)	
CL Rev Adj for Exo Changes	$6,493,317	

Computation of Adjusted 6/84 - 5/85 Common Line/MOU Rate
using data provided by USTA

Prem MOU	159,296,057
Non-Prem MOU	24,306,300
Total MOU	183,602,357
WATS DA	23,462,547
Tot MOU less WATS DA	160,139,810
Stim MOU: SLC	4,952,100
Stim MOU: Exo	0
Stim MOU: SLC at 89	19,136,260
Stim MOU: Exo at 89	4,543,597
Total MOU Adj for Exo Changes	178,867,567
Subscriber Lines	109,965,483
CL/MOU Rate Adj for Exo Changes	$0.0363
CL/MOU Rate Unadj	$0.0554
CL/Loop Rate Adj for Exo Changes	$59.05
CL/Loop Rate Unadj	$92.51

Computation of Adjusted 1989 Traffic Sensitive/MOU Rate
using data provided by USTA

Access Rev (TS-SW)	$8,628,568	As reported
Net Return	$1,726,923	As reported
ANI	$13,278,848	As reported
FIT/SLIT	0.603354	As reported
ROR	13.01%	Net Return / ANI
Net Return at 12%	$1,593,462	12% * ANI
Earnings above 12%	$133,461	Net Return at 12% - Net Return
Revenue above 12%	$213,986	(1 + FIT/SLIT) * Earnings above 12%
TS-SW Rev at 12%	$8,414,582	Access Rev (CL) - Revenue above 12%
Equal Access	$239,445	As reported
EA Excess Rev	$0	See page 15 of this chart
EA at 12%	$239,445	Equal Access - EA Excess Rev
TS-SW less EA at 12%	$8,175,137	TS-SW Rev at 12% - EA at 12%
Prem MOU	286,484,681	As reported
Non-Prem MOU	7,279,056	As reported
Total MOU	293,763,737	Prem MOU + Non-Prem MOU
Stim MOU: SLC	4,505,149	As reported
Stim MOU: Exo	1,069,675	As reported
Total MOU Adj for Exo Changes	293,763,737	No adjustment made; Total MOU reflects 1989 stimulation
TS-SW Rate Adj for Exo Changes	$0.0278	TS-SW less EA / Total MOU Adj
TS-SW Rate Unadj for Exo Changes	$0.0294	Access Rev (TS-SW) / Total MOU

Computation of Adjusted 1988 Traffic Sensitive/MOU Rate
using data provided by USTA

Access Rev (TS-SW)	$8,231,744	
Net Return	$1,722,997	
ANI	$12,825,399	
FIT/SLIT	0.607716	
ROR	13.43%	
Net Return at 12%	$1,539,048	
Earnings above 12%	$183,949	
Revenue above 12%	$295,738	
TS-SW Rev at 12%	$7,936,006	
Equal Access	$255,242	
EA Excess Rev	$0	
EA at 12%	$255,242	
TS-SW less EA at 12%	$7,680,764	
SPF Phase-Down	($2,138)	All exogenous changes are cumulated for all later years. Thus the effect in 1988 is the amount reported for 1989. The effect in 1986/7 will be the sum of the 1989 and 1988 amounts, and so on. This adjusts exogenous changes to 1989 levels.
Reserve Def Amort	$25,731	
COE Cat 3 - Dems	($205,531)	
COE Cat 4 - Terms	$7,289	
Acct 662	($5,685)	Only the Tax Reform Act exogenous change must be recast to remove the portion of the exogenous change reflected in the EA category.
TS-SW Rev Adj for Exo Changes	$7,500,430	
Prem MOU	258,269,102	
Non-Prem MOU	8,452,116	
Total MOU	266,721,218	
Stim MOU: SLC	4,284,074	Each of the two types of exogenous stimulation in each year prior to 1989 is recast to the 1989 level by multiplying the ratio of that type of 1989 Stim Mou to 1989 Total MOU less both types of 1989 Stim MOU, by the year's Total MOU less both types of the year's Stim MOU.
Stim MOU: Exo	1,080,534	
Stim MOU: SLC at 89	4,085,690	
Stim MOU: Exo at 89	970,081	
Total MOU Adj for Exo Changes	266,412,381	
TS-SW Rate Adj for Exo Changes	$0.0282	
TS-SW Rate Unadj	$0.0309	

Computation of Adjusted 7/86 - 6/87 Traffic Sensitive/MOU Rate
using data provided by USTA

Access Rev (TS-SW)	$7,102,456	
Net Return	$1,517,112	
ANI	$11,662,549	
FIT/SLIT	0.867188	
ROR	13.01%	
Net Return at 12%	$1,399,506	
Earnings above 12%	$117,606	
Revenue above 12%	$219,593	
TS-SW Rev at 12%	$6,882,863	
Equal Access	$220,924	Equal Access revenue is reported at the
EA Adjust to 12%	($2,100)	authorized rate of return. For this
EA at 12%	$218,824	year, an average ROR of 12.375 was assumed. The adjustment is computed by
TS-SW less EA at 12%	$6,664,039	multiplying EA ANI/EA Revenue by 0.375% by reported Equal Access. See 1989 TRP, COS-1(P) for EA ANI/EA Rev

Computation of Adjusted 7/86 - 6/87 Traffic Sensitive/MOU Rate
using data provided by USTA

SPF Phase-Down	($5,185)
Reserve Def Amort	$86,031
Tax Reform	($350,675)
Tax Reform less EA	($339,526)
COE Cat 3 - Dems	($323,228)
COE Cat 4 - Terms	$9,550
Acct 662	($20,872)
Conformance	$393,380
FASB 87	($38,082)
TS-SW Rev Adj for Exo Changes	$6,426,107
Prem MOU	213,555,674
Non-Prem MOU	13,332,499
Total MOU	226,888,173
Stim MOU: SLC	3,380,604
Stim MOU: Exo	469,573
Stim MOU: SLC at 89	3,486,669
Stim MOU: Exo at 89	827,853
Total MOU Adj for Exo Changes	227,352,519
TS-SW Rate Adj for Exo Changes	$0.0283
TS-SW Rate Unadj	$0.0313

Computation of Adjusted 6/85 - 5/86 Traffic Sensitive/MOU Rate
using data provided by USTA

Access Rev (TS-SW)	$6,562,000	
Net Return	$1,331,020	
ANI	$10,699,691	
FIT/SLIT	0.967797	
ROR	12.44%	
Net Return at 12%	$1,283,963	
Earnings above 12%	$47,057	
Revenue above 12%	$92,599	
TS-SW Rev at 12%	$6,469,401	
Equal Access	$86,737	
EA Adjust to 12%	($1,649)	For this year, ROR was set at 12%. The adjustment was made as on page 15 of this chart, with the factor 0.75% instead of 0.375%.
EA at 12%	$85,088	
TS-SW less EA at 12%	$6,384,313	

Computation of Adjusted 6/85 - 5/86 Traffic Sensitive/MOU Rate
using data provided by USTA

SPF Phase-Down	($7,226)	
Acct 645	($37,234)	
WATS DA: 1986-7	($225,599)	assume all loop, no inside wire
Reserve Def Amort	$171,072	
Tax Reform	($374,228)	
Tax Reform less EA	($369,306)	
COE Cat 3 - Dems	($323,228)	
COE Cat 4 - Terms	$9,550	
Acct 662	($20,872)	
Conformance	$393,380	
FASB 87	($38,082)	
TS-SW Rev Adj for Exo Changes	$5,936,768	
Prem MOU	178,986,662	
Non-Prem MOU	20,500,443	
Total MOU	199,487,105	
Stim MOU: SLC	2,010,601	
Stim MOU: Exo	147,122	
Stim MOU: SLC at 89	3,084,776	
Stim MOU: Exo at 89	732,430	
Total MOU Adj for Exo Changes	201,146,588	
TS-SW Rate Adj for Exo Changes	$0.0295	
TS-SW Rate Unadj	$0.0329	

Computation of Adjusted 6/84 - 5/85 Traffic Sensitive/MOU Rate
using data provided by USTA

Access Rev (TS-SW)	$5,461,496
Net Return	$1,169,620
ANI	$9,241,731
FIT/SLIT	0.927645
ROR	12.66%
Net Return at 12%	$1,109,008
Earnings above 12%	$60,612
Revenue above 12%	$116,839
TS-SW Rev at 12%	$5,344,657
Equal Access	$46,856
EA Adjust to 12%	($891)
EA at 12%	$45,965
TS-SW less EA at 12%	$5,298,692

Computation of Adjusted 6/84 - 5/85 Traffic Sensitive/MOU Rate
using data provided by USTA

SPF Phase-Down	($9,267)	
Acct 645	($228,992)	
WATS DA: 1986-7	($215,681)	assume all loop, no inside wire
Reserve Def Amort	$171,072	
Tax Reform	($374,228)	
Tax Reform less EA	($371,010)	
COE Cat 3 - Dems	($323,228)	
COE Cat 4 - Terms	$9,550	
Acct 662	($20,872)	
Conformance	$393,380	
FASB 87	($38,082)	
TS-SW Rev Adj for Exo Changes	$4,665,562	
Prem MOU	158,815,341	
Non-Prem MOU	24,293,020	
Total MOU	183,108,361	
Stim MOU: SLC	1,073,924	
Stim MOU: Exo	0	
Stim MOU: SLC at 89	2,845,676	
Stim MOU: Exo at 89	675,660	
Total MOU Adj for Exo Changes	185,555,773	
TS-SW Rate Adj for Exo Changes	$0.0251	
TS-SW Rate Unadj	$0.0298	

TREND LINE REGRESSION
COMPUTATION OF X FACTORS FROM AT&T DATA

Annual growth rate of CL minutes per line, annual growth rate of GNPPI, and annual change in nominal prices are computed in Chart AGRO. Beginning trend line CL/MOU rate, beginning trend line TS/MOU rate, and ending trend line total switched rate are computed in Chart ATREND. Annual growth rate of CL minutes per line is 6.69%, and annual growth rate of GNPPI is 3.85%. Computed are X in proposed 50/50 CL formula, X in GNPPI-X formula, and the singular annual X. Singular annual X is the X which, when used in the 50/50 CL formula and applied to the beginning trend line CL/MOU rate, and in the GNPPI-X TS formula and applied to the beginning trend line TS/MOU rate, will give ending CL/MOU and TS/MOU rates which sum to the ending trend line Total Switched/MOU rate.

	CL	TS	TOT SW
Annual change in nominal price/MOU	-4.05%	0.93%	na
Annual change in nominal price/Line	2.43%	na	na
X in proposed 50/50 CL formula	4.80%	na	na
X in per MOU (GNPPI-X) formula	7.90%	2.92%	na
X in per Line formula	1.48%	na	na
Beginning trend line CL/MOU rate	$0.0389	na	na
Beginning trend line TS/MOU rate	na	$0.0274	na
Ending trend line Tot Switch/MOU rate	na	na	$0.0605
Singular annual X	na	na	3.98%

1984 TO 1989 END TO END
COMPUTATION OF X FACTORS FROM AT&T DATA

Annual growth rate of CL minutes per line, annual growth rate of GNPPI, and annual change in nominal prices are computed in Chart AGRO. The 1984 CL/MOU rate, 1984 TS/MOU rate, and 1989 total switched rate are reported in Chart AGRO. Annual growth rate of CL minutes per line is 6.40%, and annual growth rate of GNPPI is 3.62%. Computed are X in proposed 50/50 CL formula, X in GNPPI-X formula, and the singular annual X. Singular annual X is the X which, when used in the 50/50 CL formula and applied to the beginning CL/MOU rate, and in the GNPPI-X TS formula and applied to the beginning TS/MOU rate, will give ending CL/MOU and TS/MOU rates which sum to the ending Total Switched/MOU rate.

	CL	TS	TOT SW
Annual change in nominal price/MOU	-3.44%	2.11%	na
Annual change in nominal price/Line	2.81%	na	na
X in proposed 50/50 CL formula	4.06%	na	na
X in per MOU (GNPPI-X) formula	7.05%	1.51%	na
X in per Line formula	0.87%	na	na
Beginning CL/MOU rate	$0.0369	na	na
Beginning TS/MOU rate	na	$0.0252	na
Ending Tot Switch/MOU rate	na	na	$0.0591
Singular annual X	na	na	2.90%

1985 TO 1989 END TO END
COMPUTATION OF X FACTORS FROM AT&T DATA

Annual growth rate of CL minutes per line, annual growth rate of GNPPI, and annual change in nominal prices are computed in Chart AGRO. The 1985 CL/MOU rate, 1985 TS/MOU rate, and 1989 total switched rate are reported in Chart AGRO. Annual growth rate of CL minutes per line is 7.34%, and annual growth rate of GNPPI is 3.58%. Computed are X in proposed 50/50 CL formula, X in GNPPI-X formula, and the singular annual X. Singular annual X is the X which, when used in the 50/50 CL formula and applied to the beginning CL/MOU rate, and in the GNPPI-X TS formula and applied to the beginning TS/MOU rate, will give ending CL/MOU and TS/MOU rates which sum to the ending Total Switched/MOU rate.

	CL	TS	TOT SW
Annual change in nominal price/MOU	-5.36%	-2.03%	na
Annual change in nominal price/Line	1.62%	na	na
X in proposed 50/50 CL formula	5.59%	na	na
X in per MOU (GNPPI-X) formula	8.94%	5.61%	na
X in per Line formula	1.99%	na	na
Beginning CL/MOU rate	$0.0384	na	na
Beginning TS/MOU rate	na	$0.0300	na
Ending Tot Switch/MOU rate	na	na	$0.0591
Singular annual X	na	na	5.60%

COMPUTATION OF GROWTH RATES

This chart presents the adjusted TS/MOU and CL/MOU rates as computed in Chart ARATE. The Total Switched/MOU rates are the sum of the TS/MOU and CL/MOU rates. CL MOU per Line is computed as the CL MOU adjusted for exogenous changes computed in Chart ARATE and reported in this chart divided by the Subscriber Lines reported on this chart. The numbers on the columns on this chart correspond to the numbers on the regressions on Chart AREG.

	(1) AT&T TS/MOU AT 1989	(2) AT&T CL/MOU AT 1989	(3) AT&T TOT SW/MOU AT 1989	(4) AT&T CL/LINE AT 1989	(5) CL MOU per Line
6/84 thru 5/85	$0.0252	$0.0369	$0.0621	$60.36	1,638
6/85 thru 5/86	$0.0300	$0.0384	$0.0684	$64.81	1,687
7/86 thru 6/87	$0.0288	$0.0377	$0.0665	$67.88	1,798
Calendar 1988	$0.0281	$0.0331	$0.0612	$67.33	2,035
4/89 thru 12/89, annualized	$0.0278	$0.0313	$0.0591	$68.78	2,194
6/84 - 12/89 ann growth	2.1074%	-3.4354%	-1.0461%	2.8123%	6.4038%
6/85 - 12/89 ann growth	-2.0328%	-5.3638%	-3.8643%	1.6162%	7.3432%
Log Trend annual growth	0.9268%	-4.0525%	-1.8901%	2.4282%	6.6901%
Log Trend R-square	0.0738	0.7721	0.3591	0.7497	0.9810

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COMPUTATION OF GROWTH RATES

This chart presents the adjusted TS/MOU and CL/MOU rates as computed in Chart ARATE. The Total Switched/MOU rates are the sum of the TS/MOU and CL/MOU rates. CL MOU per Line is computed as the CL MOU adjusted for exogenous changes computed in Chart ARATE and reported in this chart divided by the Subscriber Lines reported on this chart. The numbers on the columns on this chart correspond to the numbers on the regressions on Chart AREG.

	Growth in GNP-PI	Subscr Lines excl WATS	CL MOU adj for exog	Time Trend
6/84 thru 5/85	4.0695%	110,797,336	181,478,978	7
6/85 thru 5/86	4.0681%	113,518,456	191,513,344	19
7/86 thru 6/87	3.3636%	116,421,864	209,351,126	32
Calendar 1988	3.4002%	121,719,710	247,725,473	50
4/89 thru 12/89, annualized	4.3442%	126,432,081	277,418,023	63.5
6/84 - 12/89 ann growth	3.6178%			
6/85 - 12/89 ann growth	3.5763%			
Average annual growth	3.8491%			

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LOGARITHMIC TREND REGRESSIONS

This chart presents the regression results of logarithmic time trend regressions on the TS/MOU rate, the CL/MOU rate, the Total Switched/MOU rate, and the CL MOU per line data presented in Chart AGRO. The number of the regression output on this chart corresponds with the number on the data on Chart AGRO.

(1) AT&T TS/MOU

Regression Output:		
Constant		0
Std Err of Y Est		0.071782461
R Squared		0.073845658
No. of Observations		5
Degrees of Freedom		3
X Coefficient(s)	-3.6042902	0.000769080
Std Err of Coef.	0.06276713	0.001572498

(2) AT&T CL/MOU

Regression Output:		
Constant		0
Std Err of Y Est		0.049270634
R Squared		0.772148301
No. of Observations		5
Degrees of Freedom		3
X Coefficient(s)	-3.2238964	-0.00344147
Std Err of Coef.	0.04308261	0.001079344

(3) AT&T TOT SW/MOU

Regression Output:		
Constant		0
Std Err of Y Est		0.055941451
R Squared		0.359109055
No. of Observations		5
Degrees of Freedom		3
X Coefficient(s)	-2.7043173	-0.00158886
Std Err of Coef.	0.04891563	0.001225478

LOGARITHMIC TREND REGRESSIONS

This chart presents the regression results of logarithmic time trend regressions on the TS/MOU rate, the CL/MOU rate, the Total Switched/MOU rate, and the CL MOU per line data presented in Chart AGRO. The number of the regression output on this chart corresponds with the number on the data on Chart AGRO.

(4) AT&T CL/LINE

Regression Output:		
Constant		0
Std Err of Y Est		0.030478505
R Squared		0.749685704
No. of Observations		5
Degrees of Freedom		3
X Coefficient(s)	4.11736307	0.002001350
Std Err of Coef.	0.02665063	0.000667675

(5) AT&T CL MOU PER LINE

Regression Output:		
Constant		0
Std Err of Y Est		0.019823427
R Squared		0.981044067
No. of Observations		5
Degrees of Freedom		3
X Coefficient(s)	7.34202060	0.005411068
Std Err of Coef.	0.01733375	0.000434260

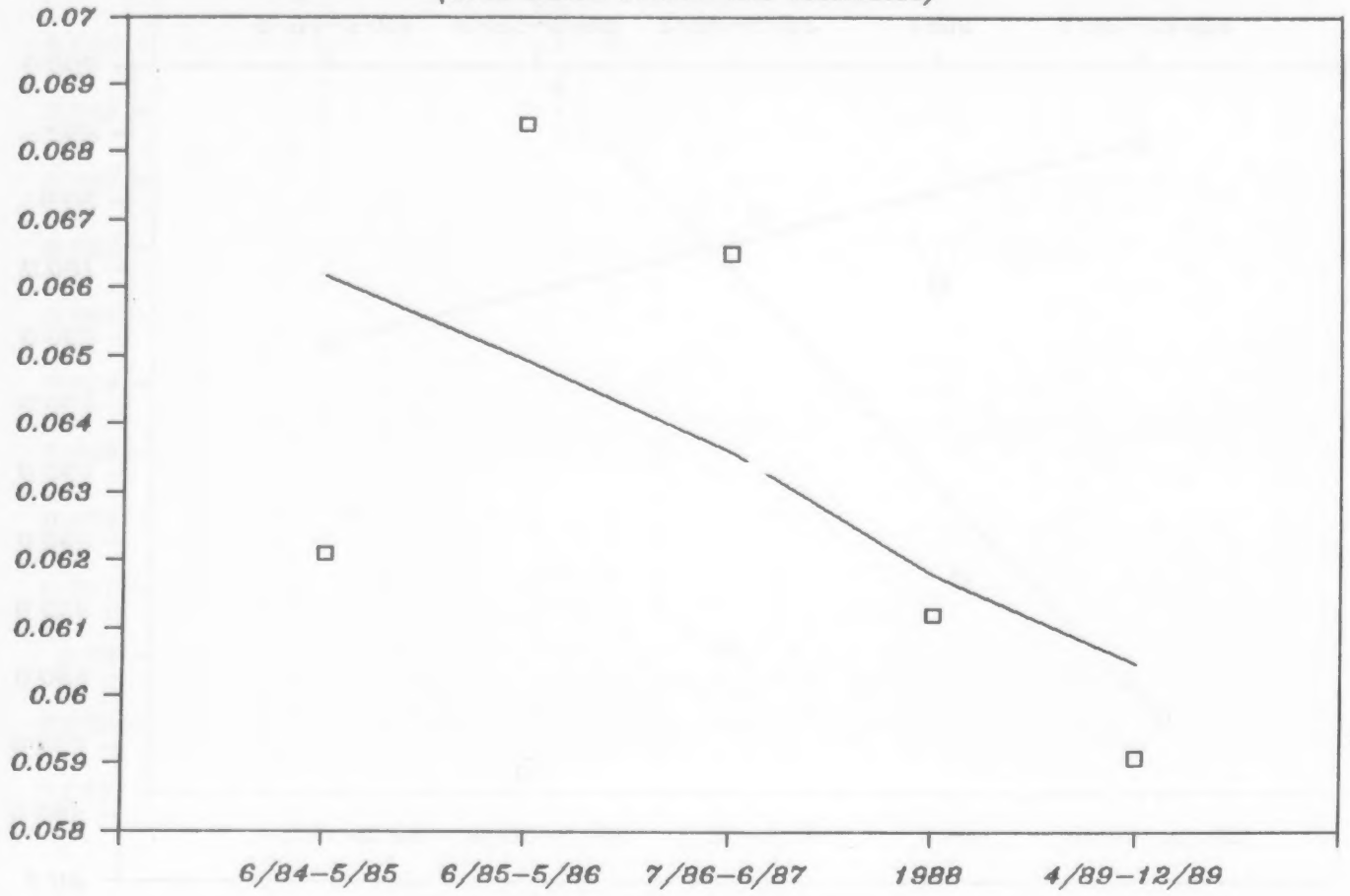
TREND LINE ESTIMATES OF ACCESS RATES AND DEMAND

This chart presents the trend line estimates of the TS/MOU, CL/MOU, and Total Switched/MOU rates, and the trend line estimate of CL MOU per Line, using the regression output from Chart AREG.

	Trend Est. AT&T TS/MOU at 1989	Trend Est. AT&T CL/MOU at 1989	Trend Est. AT&T TOT SW/MOU at 1989	Trend Est. AT&T CL/LINE at 1989	Trend Est. CL MOU per Line
1. 6/84 thru 5/85	$0.0274	$0.0389	$0.0662	$62.26	1,603
2. 6/85 thru 5/86	$0.0276	$0.0373	$0.0649	$63.78	1,711
3. 7/86 thru 6/87	$0.0279	$0.0356	$0.0636	$65.46	1,836
4. Calendar 1988	$0.0283	$0.0335	$0.0618	$67.86	2,023
5. 4/89 thru 12/89, annualized	$0.0286	$0.0320	$0.0605	$69.72	2,177

Adjusted TotSw/MOU Rates from AT&T data

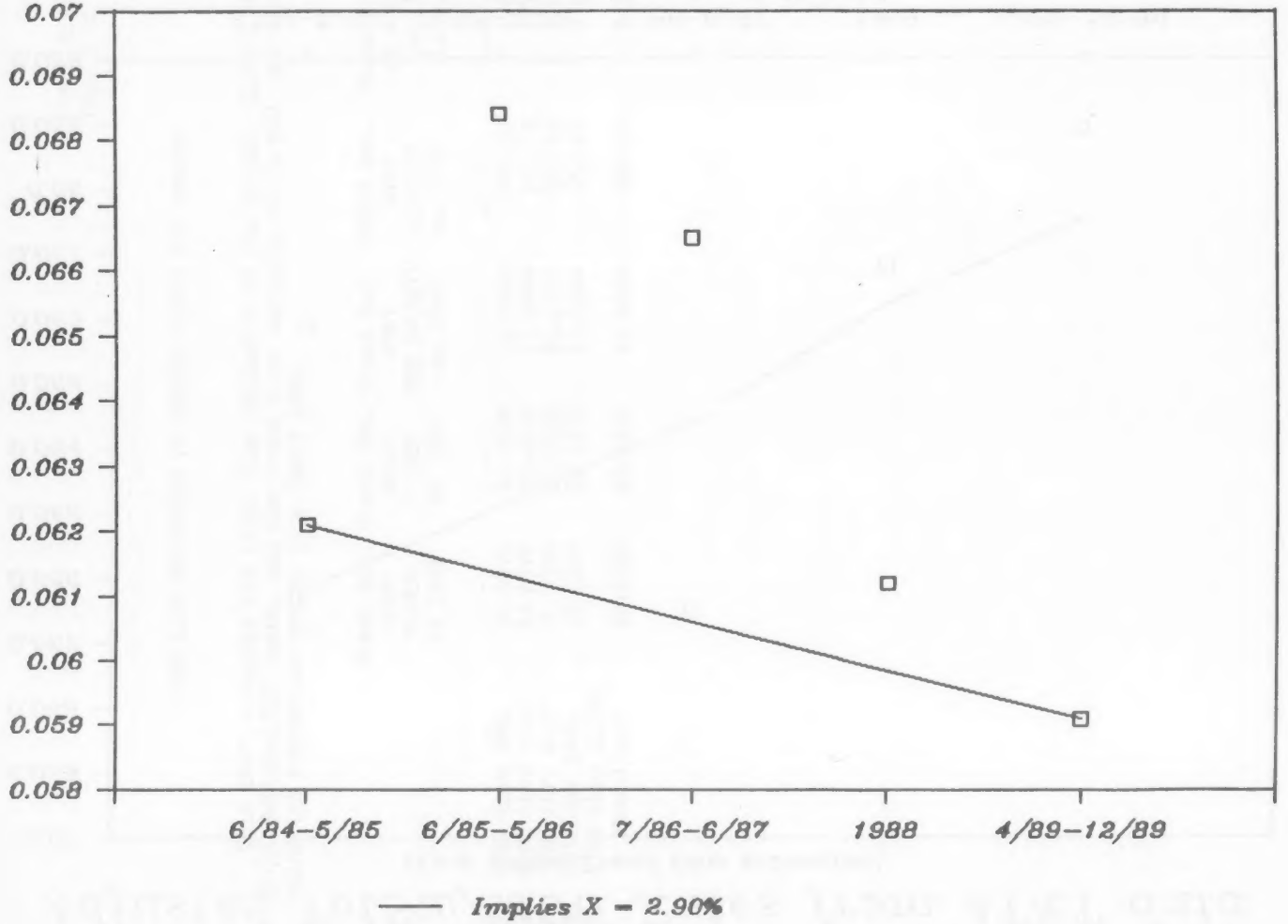
(Line shows Trend Line estimates)



2373

Adjusted TotSw/MOU Rates from AT&T data

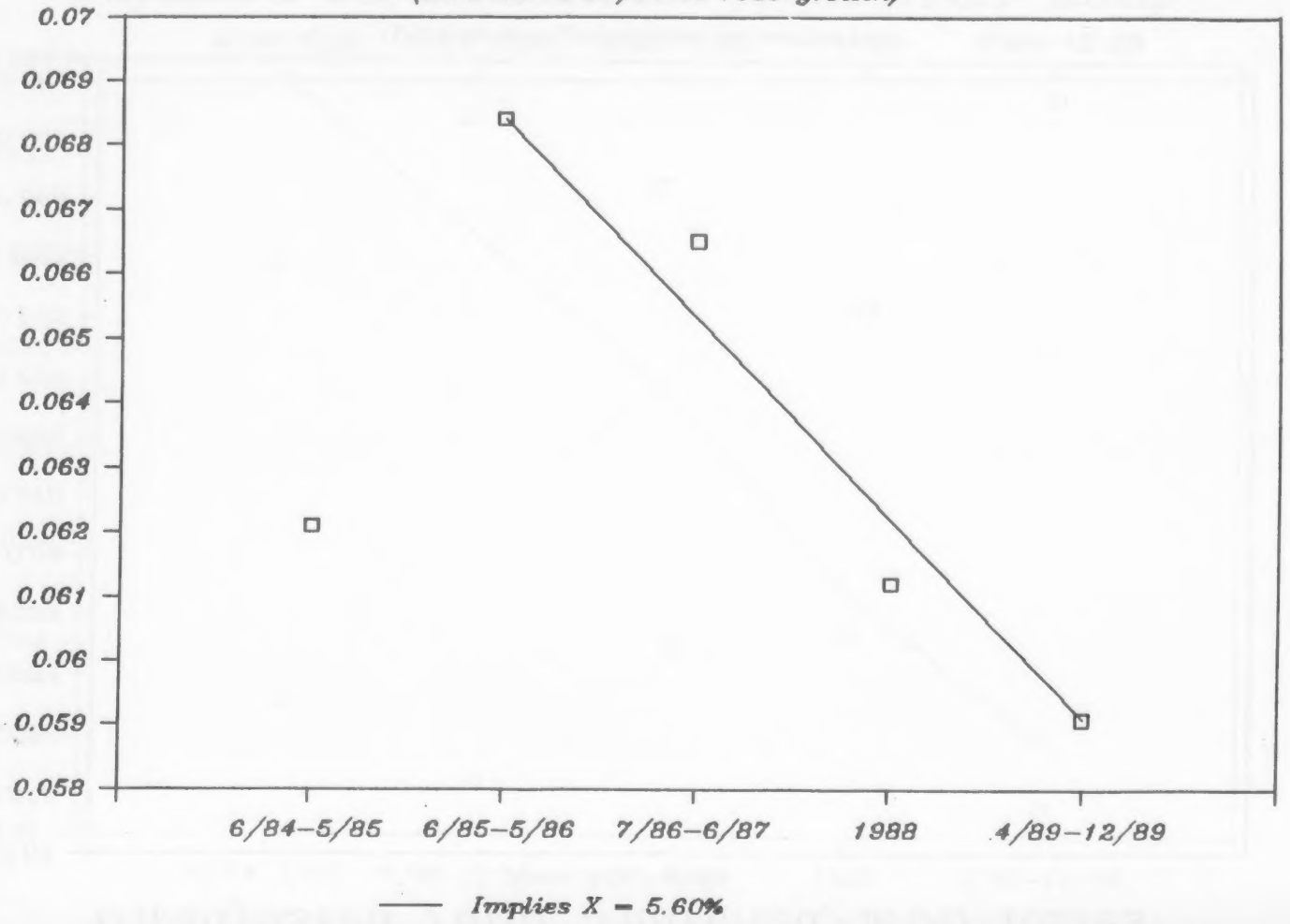
(Line shows 84/85 to 1989 growth)



2374

Adjusted TotSw/MOU Rates from AT&T data

(Line shows 85/86 to 1989 growth)



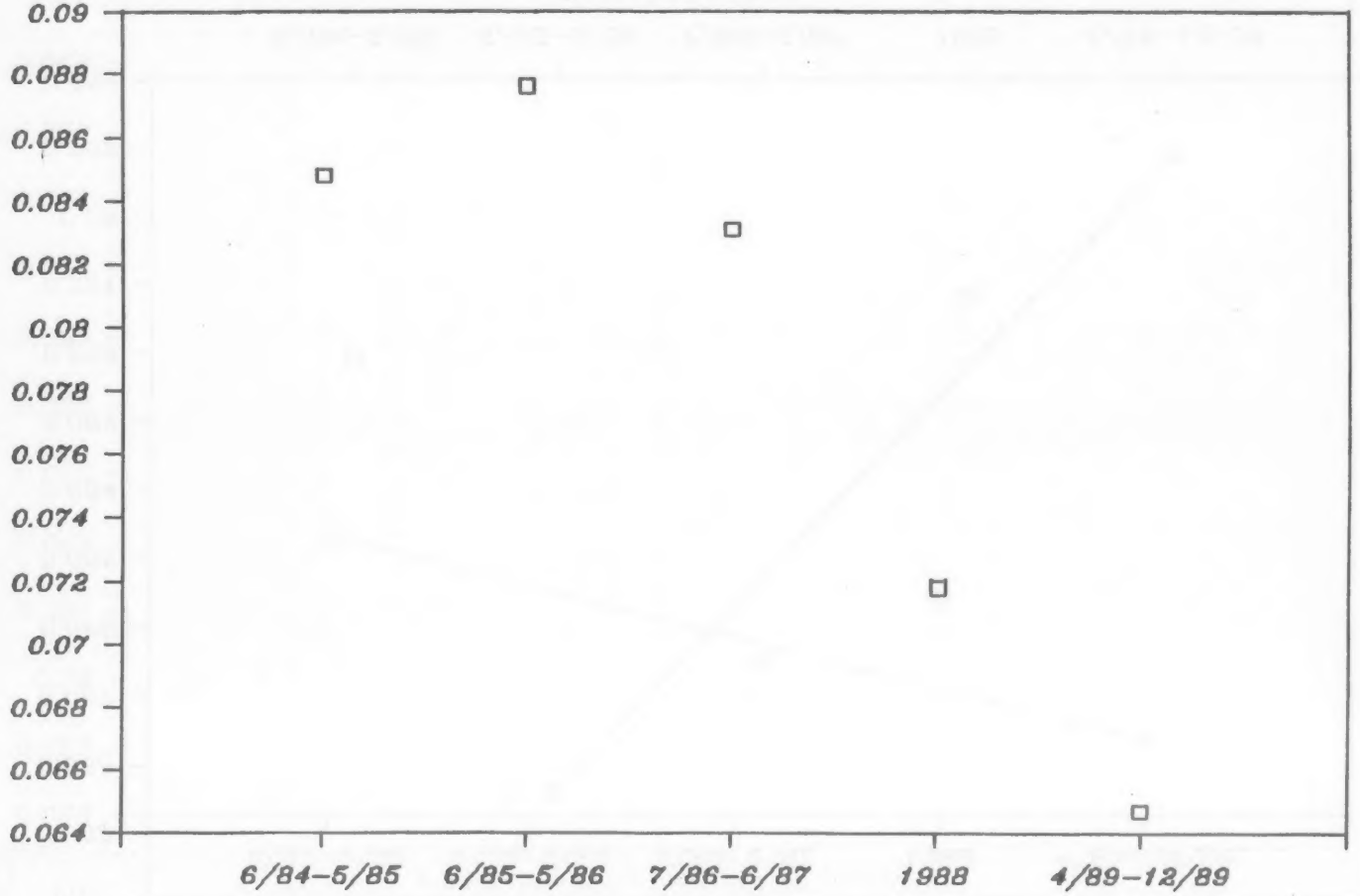
2375

Adjusted TotSw/MOU Rates from AT&T data

(Line shows 84/85 to 1989 growth)

Unadjusted Total Switched/MOU Rates

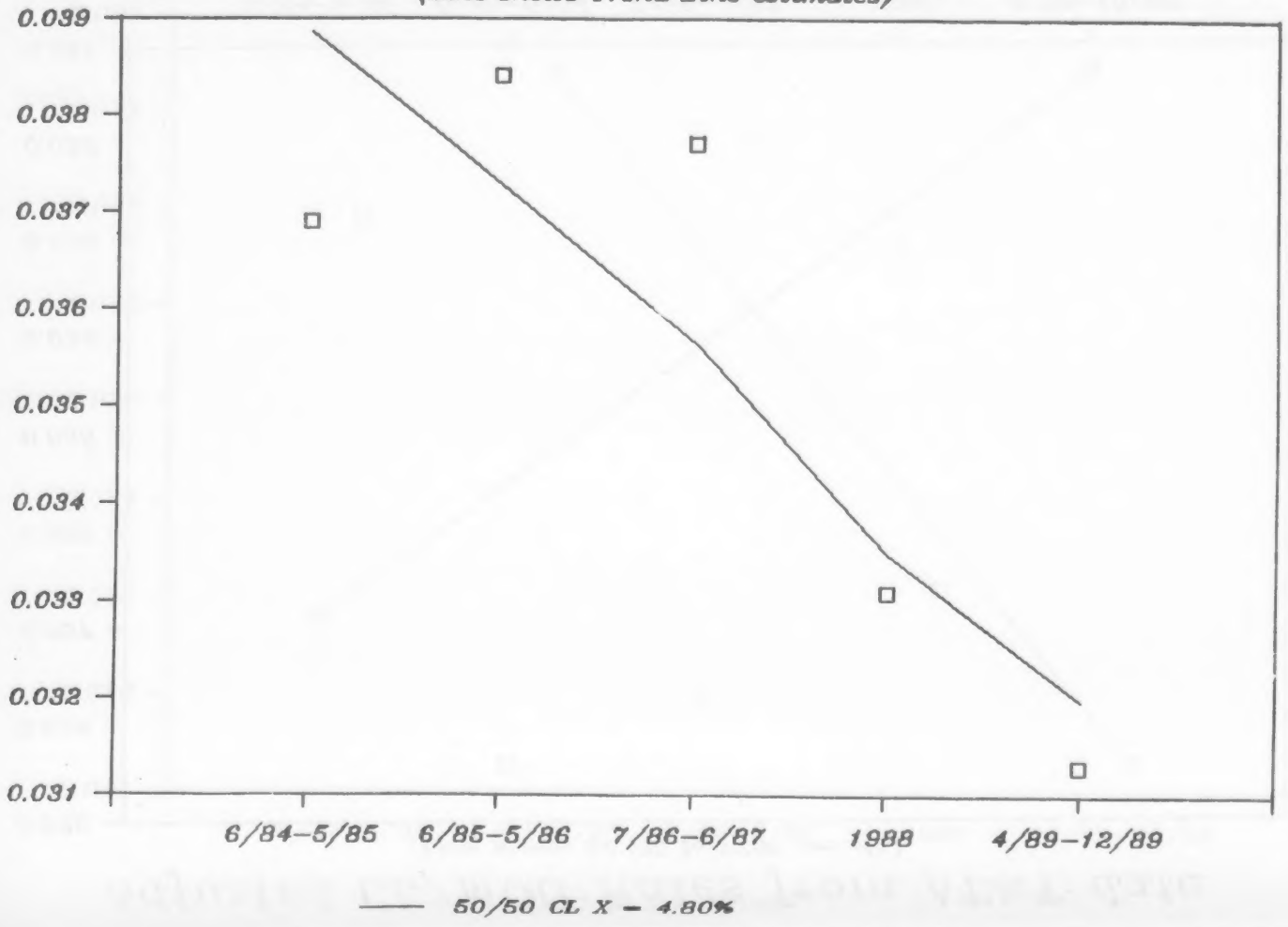
from AT&T data



2376

Adjusted CL/MOU Rates from AT&T data

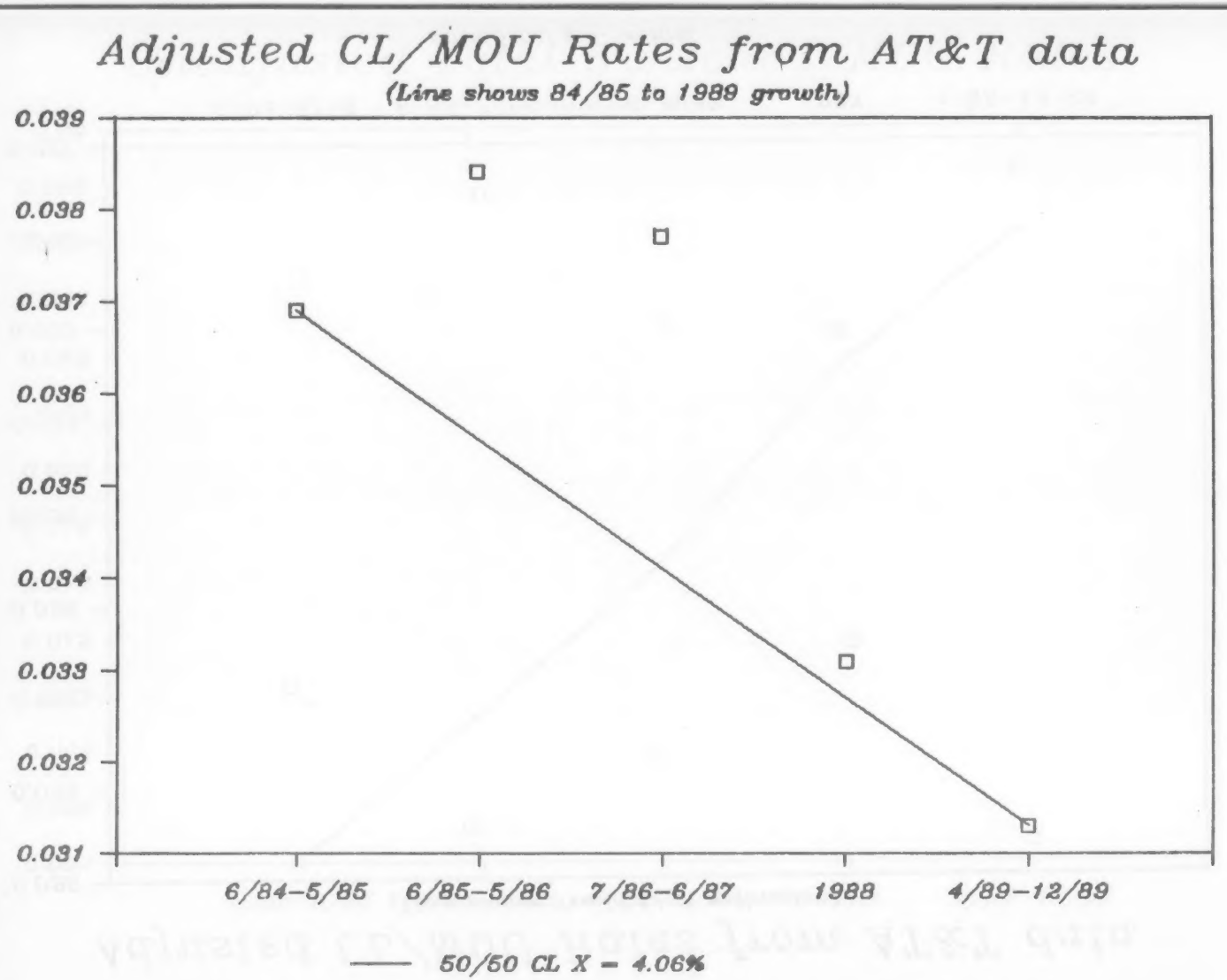
(Line shows Trend Line estimates)



2377

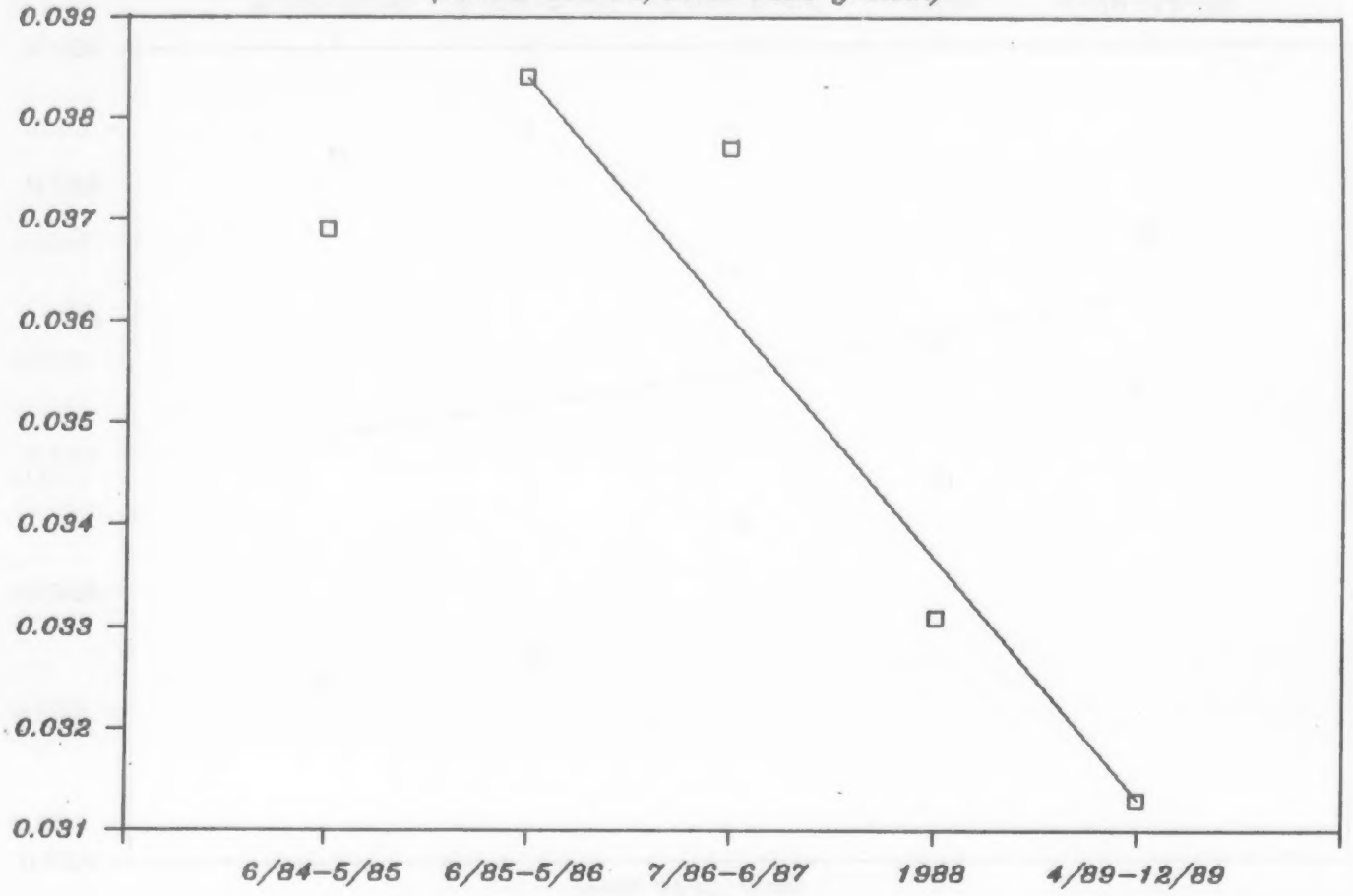
Unadjusted Total Switched/MOU Rates

from AT&T data


Adjusted CL/MOU Rates from AT&T data
(Line shows 84/85 to 1989 growth)
0.039
0.038
0.037
0.036
0.035
0.034
0.033
0.032
0.031
6/84–5/85
6/85–5/86
7/86–6/87
1988
4/89–12/89
50/50 CL X = 4.06%

Adjusted CL/MOU Rates from AT&T data

(Line shows 85/86 to 1989 growth)



2379

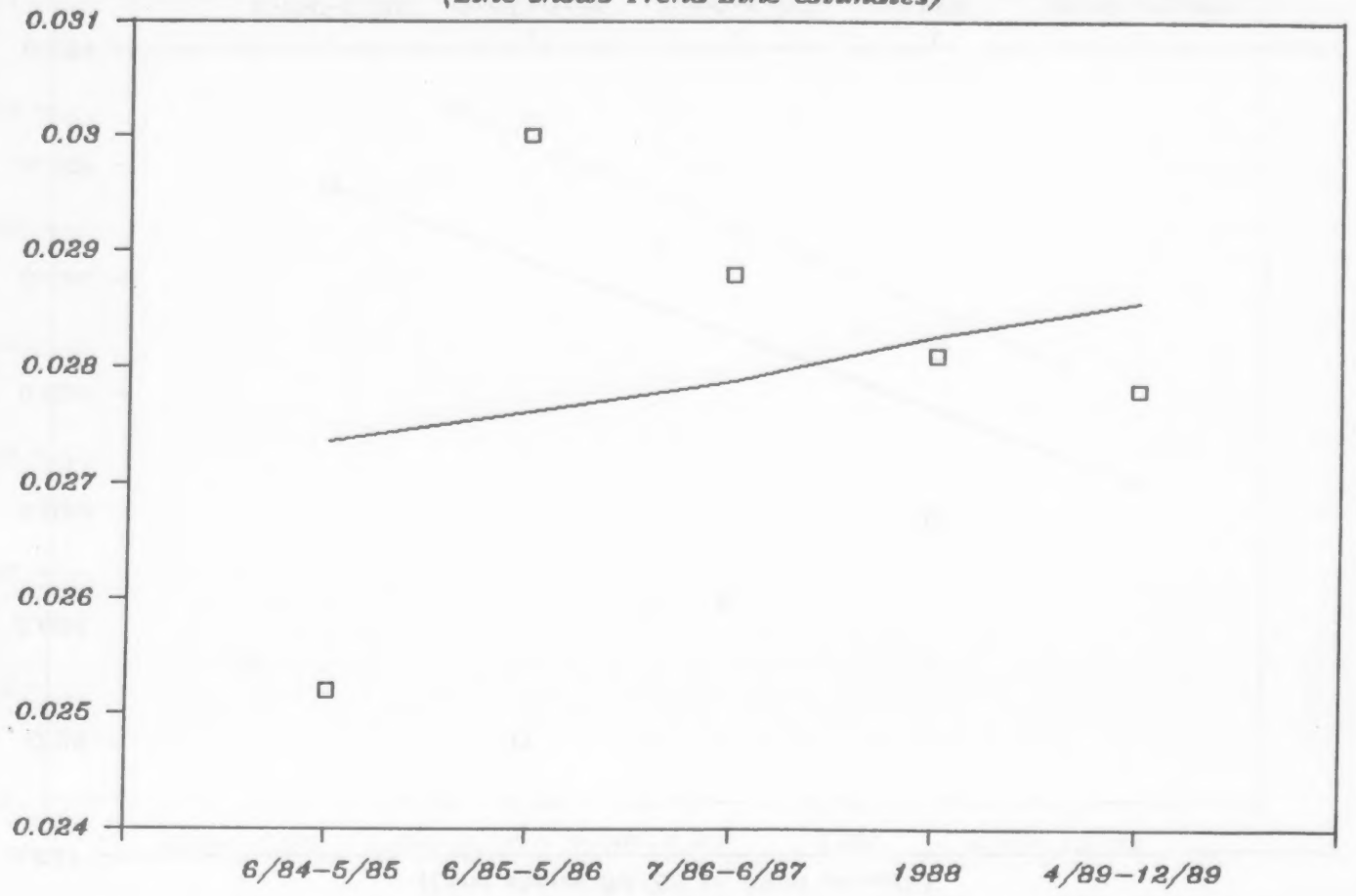
Adjusted CL/MOU Rates from AT&T data

(Line shows 84/85 to 1989 growth)

Unadjusted CL/MOU Rates
from AT&T data
0.094
0.093
0.092
0.091
0.09
0.029
0.028
6/84–5/85
6/85–5/86
7/86–6/87
1988
4/89–12/89

Adjusted TS/MOU Rates from AT&T data

(Line shows Trend Line estimates)



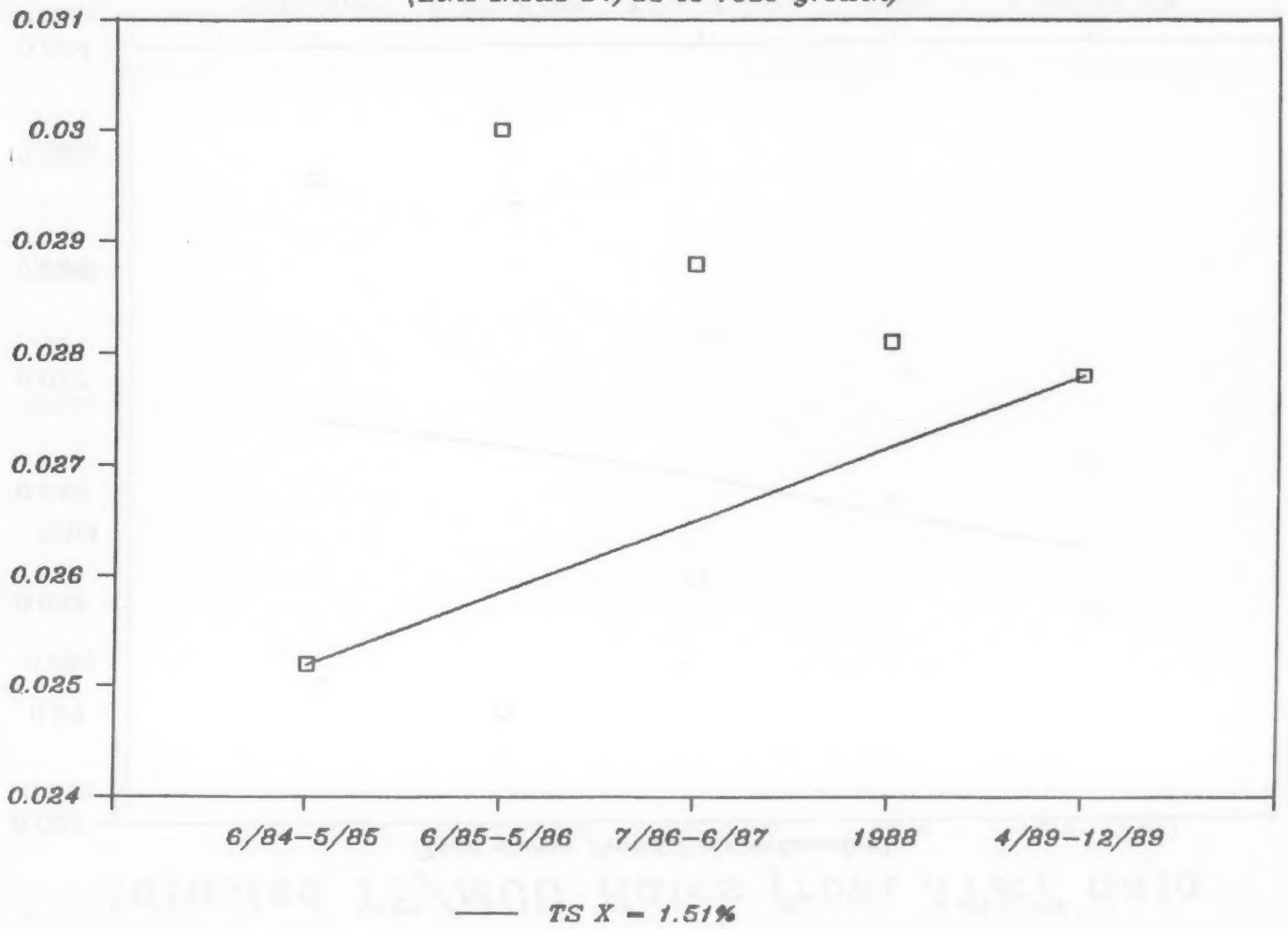
2381

Unadjusted CL/MOU Rates

from AT&T data

Adjusted TS/MOU Rates from AT&T data

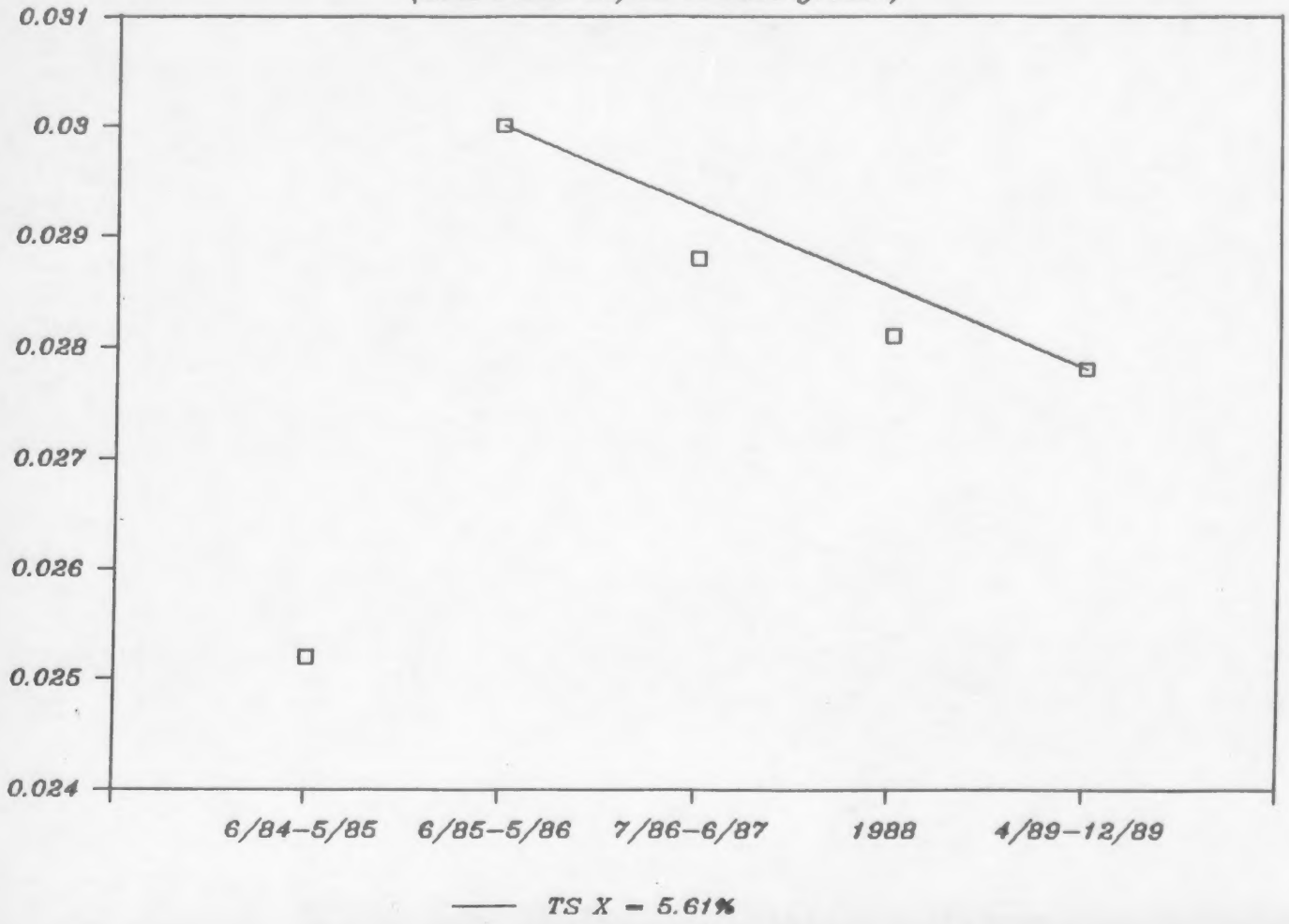
(Line shows 84/85 to 1989 growth)



2382

Adjusted TS/MOU Rates from AT&T data

(Line shows 85/86 to 1989 growth)



2383

Adjusted TS/MOU Rates from AT&T data

(Line shows 84/85 to 1989 growth)

Unadjusted TS/MOU Rates

from AT&T data

Computation of Adjusted 1989 Common Line/MOU Rate
using data provided by AT&T

Access Rev (CL)	$9,779,379	As reported by USTA
Net Return	$1,901,114	As reported by USTA
ANI	$16,546,309	As reported by USTA
FIT/SLIT	0.603354	As reported by USTA
ROR	11.49%	Net Return / ANI
Net Return at 12%	$1,985,557	12% * ANI
Earnings above 12%	($84,443)	Net Return at 12% - Net Return
Revenue above 12%	($135,392)	(1 + FIT/SLIT) * Earnings above 12%
CL Rev at 12%	$9,914,771	Access Rev (CL) - Revenue above 12%
Inside Wire	$1,070,630	As reported
IW ANI	$721,419	As reported by USTA
IW Excess Rev	($5,903)	(IW ANI / ANI) * Revenue above 12%
IW at 12%	$1,076,533	Inside Wire - IW Excess Rev
CPE	$0	As reported
CPE ANI	$0	As reported by USTA
CPE Excess Rev	$0	(CPE ANI / ANI) * Revenue above 12%
CPE at 12%	$0	CPE - CPE Excess Rev
CL less IW & CPE at 12%	$8,838,238	CL Rev at 12%-IW at 12%-CPE at 12%
High Cost Fund	$142,000	See page 2 of this chart
CL Rev Adj for Exo Changes	$8,696,238	CL less IW & CPE at 12% - HCF
Prem MOU	269,608,911	As reported by USTA
Non-Prem MOU	7,809,112	As reported by USTA
Total MOU	277,418,023	Prem MOU + Non-Prem MOU
Stim MOU: SLC	25,560,000	In all years, Stim MOU are the sum
Stim MOU: Exo	16,805,000	of reported Stim MOU from 1984 up to that year
Total MOU Adj for Incl of Stim	277,418,023	No adjustment made; Total MOU reflects 1989 stimulation
Subscriber Lines	126,432,081	As reported
CL/MOU Rate Adj for Exo Changes	$0.0313	CL Rev Adj / Total MOU Adj
CL/MOU Rate Unadj	$0.0353	Access Rev (CL) / Total MOU
CL/Loop Rate Adj for Exo Changes	$68.78	CL Rev Adj / Subscriber Lines
CL/Loop Rate Unadj	$77.35	Access Rev (CL) / Subscriber Lines

Unadjusted TS/MOU Rates

Computation of Adjusted 1988 Common Line/MOU Rate
using data provided by AT&T

Access Rev (CL)	$9,764,818	
Net Return	$1,934,811	
ANI	$16,273,868	
FIT/SLIT	0.515152	
ROR	11.89%	
Net Return at 12%	$1,952,864	
Earnings above 12%	($18,053)	
Revenue above 12%	($27,353)	
CL Rev at 12%	$9,792,171	
Inside Wire	$1,319,141	
IW ANI	$1,095,866	
IW Excess Rev	($1,842)	
IW at 12%	$1,320,983	
CPE	$0	
CPE ANI	$0	
CPE Excess Rev	$0	
CPE at 12%	$0	
CL less IW & CPE at 12%	$8,471,188	
SPF Phase-Down	($154,000)	All exogenous changes except the HCF are cumulated for all later years. Thus the effect in 1988 is the amount reported for 1989. The effect in 1986/7 will be the sum of the 1989 and 1988 amounts, and so on. This adjusts exogenous changes to 1989 levels.
SPF Phase-Down less CPE and IW	($133,225)	
High Cost Fund	$142,000	The High Cost Fund, conversely, is cumulated over all previous years. Thus, the 1988 amount is the sum of the reported 1984/5, 1985/6, 1986/7, and 1988 amounts. This amount is subtracted from CL revenue because, beginning in 1989, HCF is no longer recovered in the CCL rate.
Reserve Def Amort	$0	
COE Cat 3 - Dems	$0	
COE Cat 3 - Dems less CPE and IW	$0	
COE Cat 4 - Terms	$0	
COE Cat 4 - Terms less CPE and IW	$0	
Acct 662	$0	All exogenous changes except HCF and RDA are recast to remove the portion of the exogenous change reflected in the CPE and IW categories.
Acct 662 less CPE and IW	$0	
CL Rev Adj for Exo Changes	$8,195,963	CL less IW & CPE at 12% - HCF + All Other Exogenous Changes

Computation of Adjusted 1988 Common Line/MOU Rate
using data provided by AT&T

Prem MOU	231,308,931	
Non-Prem MOU	9,290,944	AT&T reported only the added
Total MOU	240,599,875	stimulated MOU in each year. Thus,
Stim MOU: SLC	17,803,000	the stimulated MOU in each year on
Stim MOU: Exo	12,902,000	this chart is the cumulated sum of
Stim MOU: SLC at 89	22,824,267	the MOU for that year and all
Stim MOU: Exo at 89	15,006,331	preceding years.
Total MOU Adj for Exo Changes	247,725,473	Each of the two types of exogenous stimulation in each year prior to 1989 is recast to the 1989 level
Subscriber Lines	121,719,710	by multiplying the ratio of that type of 1989 Stim Mou to 1989 Total
CL/MOU Rate Adj for Exo Changes	$0.0331	MOU less both types of 1989 Stim MOU, by the year's Total MOU less both types of the year's Stim MOU.
CL/MOU Rate Unadj	$0.0406	
CL/Loop Rate Adj for Exo Changes	$67.33	
CL/Loop Rate Unadj	$80.22	

Computation of Adjusted 7/86 - 6/87 Common Line/MOU Rate
using data provided by AT&T

Access Rev (CL)	$10,245,361
Net Return	$2,073,523
ANI	$17,650,913
FIT/SLIT	0.754386
ROR	11.75%
Net Return at 12%	$2,118,110
Earnings above 12%	($44,587)
Revenue above 12%	($78,222)
CL Rev at 12%	$10,323,583
Inside Wire	$1,288,776
IW ANI	$925,334
IW Excess Rev	($4,101)
IW at 12%	$1,292,877
CPE	$552,068
CPE ANI	$475,702
CPE Excess Rev	($2,108)
CPE at 12%	$554,176
CL less IW & CPE at 12%	$8,476,530

Computation of Adjusted 7/86 - 6/87 Common Line/MOU Rate
using data provided by AT&T

SPF Phase-Down	($307,000)
SPF Phase-Down less CPE and IW	($252,073)
High Cost Fund	$86,000
Reserve Def Amort	$203,000
Tax Reform	($482,000)
Tax Reform less CPE and IW	($395,763)
COE Cat 3 - Dems	$0
COE Cat 3 - Dems less CPE and IW	$0
COE Cat 4 - Terms	$0
COE Cat 4 - Terms less CPE and IW	$0
Acct 662	$0
Acct 662 less CPE and IW	$0
Conformance	$0
Conformance less CPE and IW	$0
FASB 87	($52,000)
FASB 87 less CPE and IW	($42,696)
CL Rev Adj for Exo Changes	$7,902,998

Computation of Adjusted 7/86 - 6/87 Common Line/MOU Rate
using data provided by AT&T

Prem MOU	186,386,900
Non-Prem MOU	12,307,843
Total MOU	198,694,743
Stim MOU: SLC	13,335,000
Stim MOU: Exo	7,979,000
Stim MOU: SLC at 89	19,288,634
Stim MOU: Exo at 89	12,681,749
Total MOU Adj for Exo Changes	209,351,126
Subscriber Lines	116,421,864
CL/MOU Rate Adj for Exo Changes	$0.0377
CL/MOU Rate Unadj	$0.0516
CL/Loop Rate Adj for Exo Changes	$67.88
CL/Loop Rate Unadj	$88.00

Computation of Adjusted 6/85 - 5/86 Common Line/MOU Rate
using data provided by AT&ST

Access Rev (CL)	$11,007,553
Net Return	$2,485,416
ANI	$18,356,104
FIT/SLIT	0.851852
ROR	13.54%
Net Return at 12%	$2,202,732
Earnings above 12%	$282,684
Revenue above 12%	$523,488
CL Rev at 12%	$10,484,065
Inside Wire	$1,643,419
IW ANI	$1,507,750
IW Excess Rev	$42,999
IW at 12%	$1,600,420
CPE	$930,998
CPE ANI	$1,167,587
CPE Excess Rev	$33,298
CPE at 12%	$897,700
CL less IW & CPE at 12%	$7,985,944

Computation of Adjusted 6/85 - 5/86 Common Line/MCU Rate
using data provided by AT&T

SPF Phase-Down	($460,000)	
SPF Phase-Down less CPE and IW	($350,392)	
Acct 645	$9,000	
Acct 645 less CPE and IW	$6,855	
High Cost Fund	$22,000	
WATS DA: 1986-7	($59,359)	assume all loop, no inside wire
Reserve Def Amort	$203,000	
Tax Reform	($482,000)	
Tax Reform less CPE and IW	($367,150)	
COE Cat 3 - Dems	$0	
COE Cat 3 - Dems less CPE and IW	$0	
COE Cat 4 - Terms	$0	
COE Cat 4 - Terms less CPE and IW	$0	
Acct 662	$0	
Acct 662 less CPE and IW	$0	
Conformance	$0	
Conformance less CPE and IW	$0	
FASB 87	($52,000)	
FASB 87 less CPE and IW	($39,610)	
CL Rev Adj for Exo Changes	$7,357,289	

Computation of Adjusted 6/85 - 5/86 Common Line/MOU Rate
using data provided by AT&T

Prem MOU	179,377,512
Non-Prem MOU	20,563,136
Total MOU	199,940,648
WATS DA	26,040,648
Tot MOU less WATS DA	173,900,000
Stim MOU: SLC	9,189,000
Stim MOU: Exo	2,444,000
Stim MOU: SLC at 89	17,645,144
Stim MOU: Exo at 89	11,601,199
Total MOU Adj for Exo Changes	191,513,344
Subscriber Lines	113,518,456
CL/MOU Rate Adj for Exo Changes	$0.0384
CL/MOU Rate Unadj	$0.0551
CL/Loop Rate Adj for Exo Changes	$64.81
CL/Loop Rate Unadj	$96.97

Computation of Adjusted 6/84 - 5/85 Common Line/MOU Rate
using data provided by AT&T

Access Rev (CL)	$10,273,000
Net Return	$2,162,478
ANI	$18,510,144
FIT/SLIT	0.851852
ROR	11.68%
Net Return at 12%	$2,221,217
Earnings above 12%	($58,739)
Revenue above 12%	($108,776)
CL Rev at 12%	$10,381,776
Inside Wire	$1,934,987
IW ANI	$2,398,915
IW Excess Rev	($14,097)
IW at 12%	$1,949,084
CPE	$1,199,814
CPE ANI	$1,893,588
CPE Excess Rev	($11,128)
CPE at 12%	$1,210,942
CL less IW & CPE at 12%	$7,221,750

Computation of Adjusted 6/84 - 5/85 Common Line/MOU Rate
using data provided by AT&T

SPF Phase-Down	($523,000)	
SPF Phase-Down less CPE and IW	($363,808)	
Acct 645	$81,000	
Acct 645 less CPE and IW	$56,345	
High Cost Fund	$0	
WATS DA: 1986-7	($57,904)	assume all loop, no inside wire
Reserve Def Amort	$203,000	
Tax Reform	($482,000)	
Tax Reform less CPE and IW	($335,288)	
COE Cat 3 - Dems	$0	
COE Cat 3 - Dems less CPE and IW	$0	
COE Cat 4 - Terms	$0	
COE Cat 4 - Terms less CPE and IW	$0	
Acct 662	$0	
Acct 662 less CPE and IW	$0	
Conformance	$0	
Conformance less CPE and IW	$0	
FASB 87	($52,000)	
FASB 87 less CPE and IW	($36,172)	
CL Rev Adj for Exo Changes	$6,687,923	

Computation of Adjusted 6/84 - 5/85 Common Line/MOU Rate
using data provided by AT&T

Prem MOU	159,296,057
Non-Prem MOU	24,306,300
Total MOU	183,602,357
WATS DA	25,402,357
Tot MOU less WATS DA	158,200,000
Stim MOU: SLC	4,435,000
Stim MOU: Exo	0
Stim MOU: SLC at 89	16,720,625
Stim MOU: Exo at 89	10,993,353
Total MOU Adj for Exo Changes	181,478,978
Subscriber Lines	110,797,336
CL/MOU Rate Adj for Exo Changes	$0.0369
CL/MOU Rate Unadj	$0.0560
CL/Loop Rate Adj for Exo Changes	$60.36
CL/Loop Rate Unadj	$92.72

Computation of Adjusted 1989 Traffic Sensitive/MOU Rate
using data provided by AT&T

Access Rev (TS-SW)	$8,628,568	As reported by USTA
Net Return	$1,726,923	As reported by USTA
ANI	$13,278,848	As reported by USTA
FIT/SLIT	0.603354	As reported by USTA
ROR	13.01%	Net Return / ANI
Net Return at 12%	$1,593,462	12% * ANI
Earnings above 12%	$133,461	Net Return at 12% - Net Return
Revenue above 12%	$213,986	(1 + FIT/SLIT) * Earnings above 12%
TS-SW Rev at 12%	$8,414,582	Access Rev (CL) - Revenue above 12%
Equal Access	$235,354	As reported
EA Excess Rev	$0	See page 15 of this chart
EA at 12%	$235,354	Equal Access - EA Excess Rev
TS-SW less EA at 12%	$8,179,228	TS-SW Rev at 12% - EA at 12%
Prem MOU	286,484,681	As reported by USTA
Non-Prem MOU	7,279,056	As reported by USTA
Total MOU	293,763,737	Prem MOU + Non-Prem MOU
Stim MOU: SLC	0	No adjustment for stimulated MOU; this
Stim MOU: Exo	0	chart develops the traffic sensitive
Total MOU Adj for Exo Changes	293,763,737	portion of the TS/MOU rate. Line termination costs, which are not traffic sensitive, are recovered in the
TS-SW Rate Adj for Exo Changes	$0.0278	TS-SW category. See page 21. TS-SW less EA / Total MOU Adj
TS-SW Rate Unadj for Exo Changes	$0.0294	Access Rev (TS-SW) / Total MOU

Computation of Adjusted 1988 Traffic Sensitive/MOU Rate
using data provided by AT&T

Access Rev (TS-SW)	$8,158,691
Net Return	$1,729,864
ANI	$12,739,637
FIT/SLIT	0.515152
ROR	13.58%
Net Return at 12%	$1,528,756
Earnings above 12%	$201,108
Revenue above 12%	$304,709
TS-SW Rev at 12%	$7,853,982
Equal Access	$204,371
EA Excess Rev	$0
EA at 12%	$204,371
TS-SW less EA at 12%	$7,649,611
SPF Phase-Down	$0
Reserve Def Amort	$0
COE Cat 3 - Dems	($230,000)
COE Cat 4 - Terms	$0
Acct 662	$0
TS-SW Rev Adj for Exo Changes	$7,419,611
Prem MOU	253,270,074
Non-Prem MOU	8,599,344
Total MOU	261,869,418
Stim MOU: SLC	0
Stim MOU: Exo	0
Stim MOU: SLC at 89	0
Stim MOU: Exo at 89	0
Total MOU Adj for Exo Changes	261,869,418
TS-SW Rate Adj for Exo Changes	$0.0283
TS-SW Rate Unadj	$0.0312

All exogenous changes are cumulated for all later years. Thus the effect in 1988 is the amount reported for 1989. The effect in 1986/7 will be the sum of the 1989 and 1988 amounts, and so on. This adjusts exogenous changes to 1989 levels.

Only the Tax Reform Act exogenous change must be recast to remove the portion of the exogenous change reflected in the EA category.

Computation of Adjusted 7/86 - 6/87 Traffic Sensitive/MOU Rate
using data provided by AT&T

Access Rev (TS-SW)	$7,129,272	
Net Return	$1,537,324	
ANI	$11,675,443	
FIT/SLIT	0.754386	
ROR	13.17%	
Net Return at 12%	$1,401,053	
Earnings above 12%	$136,271	
Revenue above 12%	$239,072	
TS-SW Rev at 12%	$6,890,200	
Equal Access	$220,924	Equal Access revenue is reported at the
EA Adjust to 12%	($2,100)	authorized rate of return. For this
EA at 12%	$218,824	year, an average ROR of 12.375 was assumed. The adjustment is computed by
TS-SW less EA at 12%	$6,671,376	multiplying EA ANI/EA Revenue by 0.375% by reported Equal Access. See 1989 TRP, COS-1(P) for EA ANI/EA Rev

Computation of Adjusted 7/86 - 6/87 Traffic Sensitive/MOU Rate
using data provided by AT&T

SPF Phase-Down	$0
Reserve Def Amort	$154,000
Tax Reform	($365,000)
Tax Reform less EA	($353,408)
COE Cat 3 - Dems	($230,000)
COE Cat 4 - Terms	$0
Acct 662	$0
Conformance	$413,000
FASB 87	($40,000)
TS-SW Rev Adj for Exo Changes	$6,614,968
Prem MOU	213,958,329
Non-Prem MOU	12,701,904
Total MOU	226,660,233
Stim MOU: SLC	0
Stim MOU: Exo	0
Stim MOU: SLC at 89	0
Stim MOU: Exo at 89	0
Total MOU Adj for Exo Changes	226,660,233
TS-SW Rate Adj for Exo Changes	$0.0292
TS-SW Rate Unadj	$0.0315

Computation of Adjusted 6/85 - 5/86 Traffic Sensitive/MOU Rate
using data provided by AT&T

Access Rev (TS-SW)	$6,500,986	
Net Return	$1,292,016	
ANI	$10,407,604	
FIT/SLIT	0.851852	
ROR	12.41%	
Net Return at 12%	$1,248,912	
Earnings above 12%	$43,104	
Revenue above 12%	$79,821	
TS-SW Rev at 12%	$6,421,165	
Equal Access	$86,737	
EA Adjust to 12%	($1,649)	For this year, ROR was set at 12%. The adjustment was made as on page 15 of this chart, with the factor 0.75% instead of 0.375%.
EA at 12%	$85,088	
TS-SW less EA at 12%	$6,336,077	

Computation of Adjusted 6/85 - 5/86 Traffic Sensitive/MOU Rate
using data provided by AT&T

SPF Phase-Down	$0	
Acct 645	($17,000)	
WATS DA: 1986-7	($103,194)	assume all loop, no inside wire
Reserve Def Amort	$154,000	
Tax Reform	($365,000)	
Tax Reform less EA	($360,163)	
COE Cat 3 - Dems	($230,000)	
COE Cat 4 - Terms	$0	
Acct 662	$0	
Conformance	$413,000	
FASB 87	($40,000)	
TS-SW Rev Adj for Exo Changes	$6,152,720	
Prem MOU	179,377,512	
Non-Prem MOU	20,563,136	
Total MOU	199,940,648	
Stim MOU: SLC	0	
Stim MOU: Exo	0	
Stim MOU: SLC at 89	0	
Stim MOU: Exo at 89	0	
Total MOU Adj for Exo Changes	199,940,648	
TS-SW Rate Adj for Exo Changes	$0.0308	
TS-SW Rate Unadj	$0.0325	

Computation of Adjusted 6/84 - 5/85 Traffic Sensitive/MOU Rate
using data provided by AT&T

Access Rev (TS-SW)	$5,280,217
Net Return	$1,186,657
ANI	$9,262,424
FIT/SLIT	0.851852
ROR	12.81%
Net Return at 12%	$1,111,491
Earnings above 12%	$75,166
Revenue above 12%	$139,197
TS-SW Rev at 12%	$5,141,020
Equal Access	$46,935
EA Adjust to 12%	($892)
EA at 12%	$46,043
TS-SW less EA at 12%	$5,094,978

Computation of Adjusted 6/84 - 5/85 Traffic Sensitive/MOU Rate
using data provided by AT&T

SPF Phase-Down	$0	
Acct 645	($148,000)	
WATS DA: 1986-7	($100,664)	assume all loop, no inside wire
Reserve Def Amort	$154,000	
Tax Reform	($365,000)	
Tax Reform less EA	($361,731)	
COE Cat 3 - Dems	($230,000)	
COE Cat 4 - Terms	$0	
Acct 662 :	$0	
Conformance	$413,000	
FASB 87	($40,000)	
TS-SW Rev Adj for Exo Changes	$4,781,582	
Prem MOU	159,296,057	
Non-Prem MOU	24,306,300	
Total MOU	183,602,357	
Stim MOU: SLC	0	
Stim MOU: Exo	0	
Stim MOU: SLC at 89	0	
Stim MOU: Exo at 89	0	
Total MOU Adj for Exo Changes	183,602,357	
TS-SW Rate Adj for Exo Changes	$0.0260	
TS-SW Rate Unadj	$0.0288	

Computation of Adjusted 1989 Traffic Sensitive/MOU Rate
using data provided by AT&T

Access Rev (TS-SW)	$8,628,568	As reported by USTA
Net Return	$1,726,923	As reported by USTA
ANI	$13,278,848	As reported by USTA
FIT/SLIT	0.603354	As reported by USTA
ROR	13.01%	Net Return / ANI
Net Return at 12%	$1,593,462	12% * ANI
Earnings above 12%	$133,461	Net Return at 12% - Net Return
Revenue above 12%	$213,986	(1 + FIT/SLIT) * Earnings above 12%
TS-SW Rev at 12%	$8,414,582	Access Rev (TS-SW) - Revenue above 12%
Equal Access	$235,354	As reported
EA Excess Rev	$0	See page 22 of this chart
EA at 12%	$235,354	Equal Access - EA Excess Rev
TS-SW less EA at 12%	$8,179,228	TS-SW Rev at 12% - EA at 12%
Prem MOU	286,484,681	As reported by USTA
Non-Prem MOU	7,279,056	As reported by USTA
Total MOU	293,763,737	Prem MOU + Non-Prem MOU
Stim MOU: SLC	27,162,000	In all years, Stim MOU are the sum
Stim MOU: Exo	18,332,000	of reported Stim MOU from 1984 up to
Total MOU Adj for Exo Changes	293,763,737	that year No adjustment made; Total MOU reflects 1989 stimulation
TS-SW Rate Adj for Exo Changes	$0.0278	TS-SW less EA / Total MOU Adj
TS-SW Rate Unadj for Exo Changes	$0.0294	Access Rev (TS-SW) / Total MOU

Computation of Adjusted 1988 Traffic Sensitive/MOU Rate
using data provided by AT&T

Access Rev (TS-SW)	$8,158,691
Net Return	$1,729,864
ANI	$12,739,637
FIT/SLIT	0.515152
ROR	13.58%
Net Return at 12%	$1,528,756
Earnings above 12%	$201,108
Revenue above 12%	$304,709
TS-SW Rev at 12%	$7,853,982
Equal Access	$204,371
EA Excess Rev	$0
EA at 12%	$204,371
TS-SW less EA at 12%	$7,649,611
SPF Phase-Down	$0
Reserve Def Amort	$0
COE Cat 3 - Dems	($230,000)
COE Cat 4 - Terms	$0
Acct 662	$0
TS-SW Rev Adj for Exo Changes	$7,419,611
Prem MOU	253,270,074
Non-Prem MOU	8,599,344
Total MOU	261,869,418
Stim MOU: SLC	18,782,000
Stim MOU: Exo	14,116,000
Stim MOU: SLC at 89	25,050,664
Stim MOU: Exo at 89	16,907,031
Total MOU Adj for Exo Changes	270,929,112
TS-SW Rate Adj for Exo Changes	$0.0274
TS-SW Rate Unadj	$0.0312

All exogenous changes are cumulated for all later years. Thus the effect in 1988 is the amount reported for 1989. The effect in 1986/7 will be the sum of the 1989 and 1988 amounts, and so on. This adjusts exogenous changes to 1989 levels.

Only the Tax Reform Act exogenous change must be recast to remove the portion of the exogenous change reflected in the EA category.

Each of the two types of exogenous stimulation in each year prior to 1989 is recast to the 1989 level by multiplying the ratio of that type of 1989 Stim Mou to 1989 Total MOU less both types of 1989 Stim MOU, by the year's Total MOU less both types of the year's Stim MOU.

Including stimulated MOU computes the effect of Line Termination costs on the TS/MOU rate. See Chart ACOMB.

Computation of Adjusted 7/86 - 6/87 Traffic Sensitive/MOU Rate
using data provided by AT&T

Access Rev (TS-SW)	$7,129,272	
Net Return	$1,537,324	
ANI	$11,675,443	
FIT/SLIT	0.754386	
ROR	13.17%	
Net Return at 12%	$1,401,053	
Earnings above 12%	$136,271	
Revenue above 12%	$239,072	
TS-SW Rev at 12%	$6,890,200	
Equal Access	$220,924	Equal Access revenue is reported at the
EA Adjust to 12%	($2,100)	authorized rate of return. For this
EA at 12%	$218,824	year, an average ROR of 12.375 was assumed. The adjustment is computed by multiplying EA ANI/EA Revenue by 0.375% by reported Equal Access. See 1989 TRP, COS-1(P) for EA ANI/EA Rev
TS-SW less EA at 12%	$6,671,376	

Computation of Adjusted 7/86 - 6/87 Traffic Sensitive/MOU Rate
using data provided by AT&T

SPF Phase-Down	$0
Reserve Def Amort	$154,000
Tax Reform	($365,000)
Tax Reform less EA	($353,408)
COE Cat 3 - Dems	($230,000)
COE Cat 4 - Terms	$0
Acct 662	$0
Conformance	$413,000
FASB 87	($40,000)
TS-SW Rev Adj for Exo Changes	$6,614,968
Prem MOU	213,958,329
Non-Prem MOU	12,701,904
Total MOU	226,660,233
Stim MOU: SLC	13,919,000
Stim MOU: Exo	8,758,000
Stim MOU: SLC at 89	22,316,826
Stim MOU: Exo at 89	15,061,927
Total MOU Adj for Exo Changes	241,361,986
TS-SW Rate Adj for Exo Changes	$0.0274
TS-SW Rate Unadj	$0.0315

Computation of Adjusted 6/85 - 5/86 Traffic Sensitive/MDU Rate
using data provided by AT&T

Access Rev (TS-SW)	$6,500,986	
Net Return	$1,292,016	
ANI	$10,407,604	
FIT/SLIT	0.851852	
ROR	12.41%	
Net Return at 12%	$1,248,912	
Earnings above 12%	$43,104	
Revenue above 12%	$79,821	
TS-SW Rev at 12%	$6,421,165	
Equal Access	$86,737	
EA Adjust to 12%	($1,649)	For this year, ROR was set at 12%. The adjustment was made as on page 15 of this chart, with the factor 0.75% instead of 0.375%.
EA at 12%	$85,088	
TS-SW less EA at 12%	$6,336,077	

Computation of Adjusted 6/85 - 5/86 Traffic Sensitive/MOU Rate
using data provided by AT&T

SPF Phase-Down	$0	
Acct 645	($17,000)	
WATS DA: 1986-7	($103,194)	assume all loop, no inside wire
Reserve Def Amort	$154,000	
Tax Reform	($365,000)	
Tax Reform less EA	($360,163)	
COE Cat 3 - Dems	($230,000)	
COE Cat 4 - Terms	$0	
Acct 662	$0	
Conformance	$413,000	
FASB 87	($40,000)	
TS-SW Rev Adj for Exo Changes	$6,152,720	
Prem MOU	179,377,512	
Non-Prem MOU	20,563,136	
Total MOU	199,940,648	
Stim MOU: SLC	9,189,000	
Stim MOU: Exo	2,444,000	
Stim MOU: SLC at 89	20,601,836	
Stim MOU: Exo at 89	13,904,457	
Total MOU Adj for Exo Changes	222,813,940	
TS-SW Rate Adj for Exo Changes	$0.0276	
TS-SW Rate Unadj	$0.0325	

Computation of Adjusted 6/84 - 5/85 Traffic Sensitive/MOU Rate
using data provided by AT&T

Access Rev (TS-SW)	$5,280,217
Net Return	$1,186,657
ANI	$9,262,424
FIT/SLIT	0.851852
ROR	12.81%
Net Return at 12%	$1,111,491
Earnings above 12%	$75,166
Revenue above 12%	$139,197
TS-SW Rev at 12%	$5,141,020
Equal Access	$46,935
EA Adjust to 12%	($892)
EA at 12%	$46,043
TS-SW less EA at 12%	$5,094,978

Computation of Adjusted 6/84 - 5/85 Traffic Sensitive/MOU Rate
using data provided by AT&T

SPF Phase-Down	$0	
Acct 645	($148,000)	
WATS DA: 1986-7	($100,664)	assume all loop, no inside wire
Reserve Def Amort	$154,000	
Tax Reform	($365,000)	
Tax Reform less EA	($361,731)	
COE Cat 3 - Dems	($230,000)	
COE Cat 4 - Terms	$0	
Acct 662	$0	
Conformance	$413,000	
FASB 87	($40,000)	
TS-SW Rev Adj for Exo Changes	$4,781,582	
Prem MOU	159,296,057	
Non-Prem MOU	24,306,300	
Total MOU	183,602,357	
Stim MOU: SLC	4,435,000	
Stim MOU: Exo	0	
Stim MOU: SLC at 89	19,601,840	
Stim MOU: Exo at 89	13,229,546	
Total MOU Adj for Exo Changes	211,998,744	
TS-SW Rate Adj for Exo Changes	$0.0226	
TS-SW Rate Unadj	$0.0288	

COMPUTATION OF ADJUSTED TRAFFIC SENSITIVE RATE PER MOU
USING AT&T DATA

This chart adjusts the traffic sensitive rates in order to eliminate the effect of demand stimulation on the non-traffic sensitive portion of the traffic-sensitive category (line termination access element).

	TS/MOU Rates, excluding stimulation	TS/MOU Rates, including stimulation	Ratio of Line Termination Revenues to Total TS Revenue	Weighted Average TS/MOU Rate
6/84 thru 5/85	$0.0260	$0.0226	23.599282%	$0.0252
6/85 thru 5/86	$0.0308	$0.0276	23.599282%	$0.0300
7/86 thru 6/87	$0.0292	$0.0274	23.599282%	$0.0288
Calendar 1988	$0.0283	$0.0274	23.599282%	$0.0281
4/89 thru 12/89, annualized	$0.0278	$0.0278	23.599282%	$0.0278

Appendix D

Total Telephone Productivity In The Pre and Post-Divestiture Periods

by
Thomas C. Spavins
and
James M. Lande[1]

Studies of productivity of local telephone companies' provision of exchange access filed by participants in the Federal Communications Commission's Price Cap Proceeding[2] have for the most part concentrated on a detailed examination of the change in the price of interstate access during the post-divestiture period. The effort to extract a forward looking estimate of telephone company productivity from recent experience suffers from the limited number of years which have elapsed since the divestiture, and the massive but not to be repeated changes in the circumstances of interstate access. This study tries to confirm the results of these estimates of fundamental local carrier productivity by the use of a different approach. This study examines the indirect productivity of the telephone industry by observing the price performance of the total telephone industry. The local telephone industry includes but is not limited to the interstate access business that is subject to the jurisdiction of the Federal Communications Commission. This study is also different in approach in that makes use of information from the 60 year time period 1929 -1989, and uses simple statistical techniques combined with some observations on the economics of regulation to explore the validity of the assumption that past trends are continuing into the future.

It is well established that the division of the local telephone business between the federal and state jurisdictions is the result of political processes that use accounting rules to divide what are for the most part unitary local telephone firms into jurisdictional portions. The local telephone networks themselves are unified collections of facilities that are used for both local and interstate services. The costs of this unified network are then divided using a combination of fixed allocators and relative use

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2 Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 3 FCC Rcd 3195 (Further Notice); 4 FCC Rcd 2873 (1989) (Second Further Notice).

allocators into jurisdictional portions. In general any tendency toward more rapid technological progress in telephony will tend to be observed in both jurisdictions. Reductions in switching costs, for example, will be apportioned between both jurisdictions. This is not to say that the measured productivity will necessarily be the same in both jurisdictions. A significant portion of local telephone costs are classified as non-traffic sensitive costs. These costs are divided between jurisdictions in predetermined proportions. If, for example, the rate of growth in interstate traffic were greater than the rate of growth of local services, interstate should appear to be more productive.[3] Nevertheless, general technological or other cost related changes should show up in both jurisdictions.

Another advantage of the approach used here is that the efforts to estimate interstate price performance require that one make adjustments for many changes in the division of costs between jurisdictions which have taken place in recent years. A composite approach considers the impact of these changes on both sides of the jurisdictional boundary. This should lessen the danger that the productivity estimate is distorted by a failure to keep accurate account of the changes in the boundary. The composite approach also should be less sensitive to the one-time effects such as the conversion to equal access.

This study uses price data spanning 60 years to estimate the rate of growth in productivity. The use of the entire 1929-1989 period has the effect of reducing the sensitivity of the analysis to the results observed in any one year. This study also specifically focuses on the 1946 to 1989 period. Inclusion of these two long term analyses permits one to explore another alternative source of change in measured price performance. It is well established that the series on overall productivity for the telephone industry was not constant. Productivity appeared to accelerate in the latter portion of the period under study. If one could identify the reason for the change in productivity, it would provide a clue as to whether productivity was constant throughout this period or whether it had accelerated. A satisfactory understanding of the long term trend would also help to establish whether one could discern any discontinuities at the time of the 1984 divestiture of the Bell Operating Companies from AT&T.

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3 This is not true for the costs which are apportioned on a relative use basis. In that case a greater rate of growth causes a greater assignment of costs. The economies of traffic growth, if any, are shared between both jurisdictions. For evidence on the historic rate of growth of interstate usage see Table 11 Subscriber Line Usage: Tier 1 Companies p.16 of the study "Trends in Telephone Service" (Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission) released February 14, 1990.

Charts 1(a) and 1(b) present the basic time series. The solid line shows the constant compound yearly trend. The other line plots the price index for all telephone service from the Bureau of Labor Statistics consumer price index (CPI) divided by the change in the CPI.[4] The average real price of telephone service fell at about 1.7 percent throughout this time period. That is to say the productivity of the telephone industry exceed that of the average industry by about 1.7 percent a year. The change was not constant throughout the period. The onset of the Great Depression was marked by a sharp rise in the price of telephone service. Prices then fell at about the long term trend. The real price of telephone service fell sharply at end of the Second World War, leveled off for a time, and then began a rapid fall until the early 1980s. According to this data the price of telephone service rose toward the long term trend during the end of the period.

The rate of inflation has been identified as a factor in the economics of the telephone industry. An increase in the rate of inflation tends to cause an increase in the costs of the telephone companies who then must seek regulatory approval for rate increases. A rise in the rate of inflation is often associated with increases in the rate of interest which increase the returns required by telephone company investors. This causes yet another need for a rate increase. Regulators are reluctant to grant rate increases, even if their only effect is to offset general inflation. During this period of lag between an increase in the rate-of-inflation and the rise in regulated prices, telephone company inflation adjusted prices tend to fall. This effect has been noted many times by observers of the telephone industry.[5]

For example, the economic history of the telephone industry over the last 40 years can be divided into several periods. There was an initial period of post-war recovery and response to the post-war inflation. There was a long period of relative price stability (The Eisenhower "Golden Age"). This was followed by a sharp fall in relative price as the inflation of the late 1960s began and continued until 1982. The early 1980s were marked by

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4 The CPI-Urban "All Telephone" data used were orginally compiled by the United States Department of Labor, Bureau of Labor Statistics. See Monitoring Report in CC Docket 87-339, prepared by the Federal State Joint Board in CC Docket 80-286, released September 1988 and January 1990.

5 See Temin, P. The Fall of the Bell System (Cambridge:1988); VonAuw, A. Heritage and Destiny (Praeger: 1984); Brooks, J. Telephone (Harper and Row: 1975); Joskow, P. "Inflation and Environmental Concern: Structural Change in the Process of Public Utility Regulation" Journal of Law and Economics Vol. XVII(2) Otober 1974; Alberg, B. and Sievers, M. "The Averch-Johnson-Wellisz Model and the Telecommunications Industry" Federal Communications Bar Journal Fall, 1988; and Spavins, T. "An Introduction to the Economics of Price Cap Regulation" (Federal Communications Commission: 1990).

a rise in the price of telephone service. Carrier profitability was under great pressure in the late 1940s, and the 1970s. The 1950s and early 1960s were years of good profits for the telephone companies. The 1980s were a period in which earnings recovered from their relatively depressed level of the preceding decade.[6]

Chart 2 presents the results of three regression equations which were estimated to explore the connection between the rate-of-inflation and the change in carrier price performance relative to the long term trend. In general, high or rising inflation is associated with real relative prices that fall faster than average. A simple regression equation was estimated to explain the change in the gap between measured productivity and the rate of inflation. Two independent variables were used: the rate of inflation and the change in the rate-of-inflation. The results are significant in the statistical sense, and explain about 65 percent of the variation around the long term trend in productivity.

Charts 3(a), 3(b), and 3(c) plot of the difference between the actual real price of telephone service and the predictions of the regression equations. The plot of these residuals shows no trend over time. If there was a trend in the residuals this might suggest that the structure of the technical progress changed over this period. Visual inspection of the charts show no such pattern. Furthermore, the regression equations explain over 65 percent of the variation in productivity around the long term trend. The apparent increase in telephone company productivity that appeared to exist starting in the late 1960s appears to be an artifact of the impact of inflation on the companies, rather than a technical breakout. The results of the simple regression equation do not change when a more complex model (model c) is studied.

On reflection this should not be too surprising or distressing. A productivity growth of almost 2 percent per year <u>in excess</u> of the economy as a whole is "impressive"[7] for such a large and mature industry. The telephone industry is very capital intensive. The preponderance of the revenue requirement of the industry is driven by the costs of telephone plant (capital returns, depreciation, taxes and maintenence). Technical change is embedded in this plant which is only updated over a period of time.

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6 This view of carrier profitability is contained throughout the sources cited in note 5. There is a significant relationship between the price of AT&T's equity and deviations from the long term price path.

7 <u>See</u> Spavins, T. "Federal Regulatory Policy and Information Services: An Economist's Perspective" in <u>Integrated Services Digital Network</u> (North Holland: 1987)

The charts and the regression model show no sharp break in the rate of price progress at the time of the divestiture of AT&T. However, this study is neither an estimate of the impact of the recent changes in pricing nor the change in industry structure. In order to address the impact of these changes one would have to construct a history of the industry without the recent changes. The failure to show an increase in the rate of productivity does not mean there was no effect from the changes.[8] Rather, it indicates that even including any net benefits of the recent changes, the industry was able just to achieve its historical rate of relative productivity. Nor can one use these results to predict the impossibility of a breakout in technical change in this industry. The only inference that is appropriate is that one cannot assume that there is any evidence in the data to indicate that one is underway. The impressive productivity of this industry may be enhanced in the years to come, but it can not be assumed as a mere continuation of past trends.

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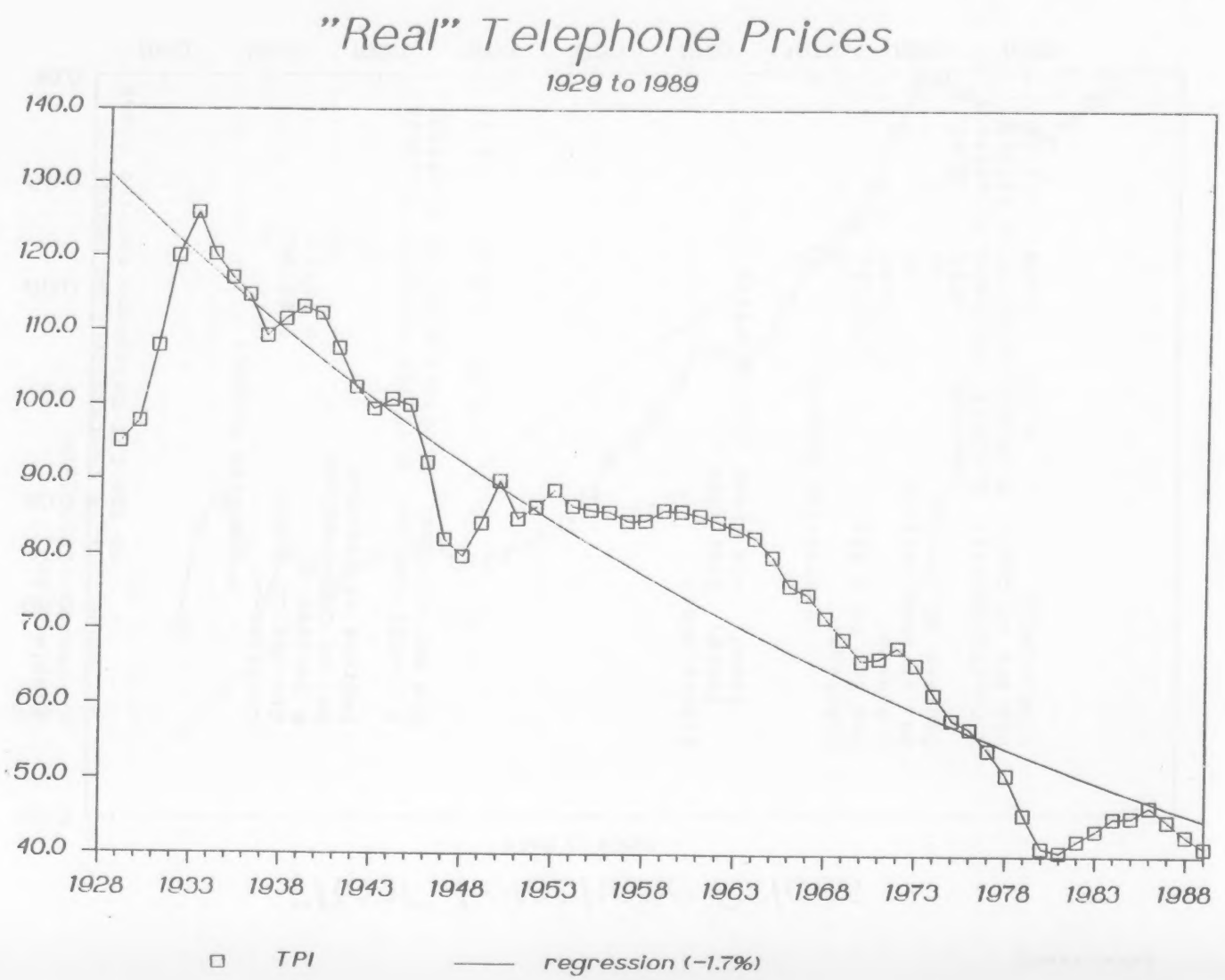
8 The telephone industry was buffeted by a number of important events during the last ten years. First, the federal income tax laws were revised in important ways in 1981 and 1986. The 1981 revisions had the effect of increasing the ability of the telephone companies make use of provisions of the tax code which were designed to encourage (reduce the cost of) new investments. For a capital intensive industry, such as the local telephone industry, this should have had the effect of reducing over time the relative price of telephone service. The 1986 revisionshad the effect of initially reducing industry revenue requirements by lowering the statutory tax rate, but at the expense of long term adverse effects from a reduction in the incentives for new investment. Thus, the price reducing effects of the 1981 revisions were at first increased, but then reduced by the 1986 Act. The 1980s were also a period when the real (i.e., inflation adjusted) cost of capital was at sustained historically high levels. This effect would tend to increase over time the relative price of telephone service. Thus, these two potentially major factors were at work in opposite directions during this period.

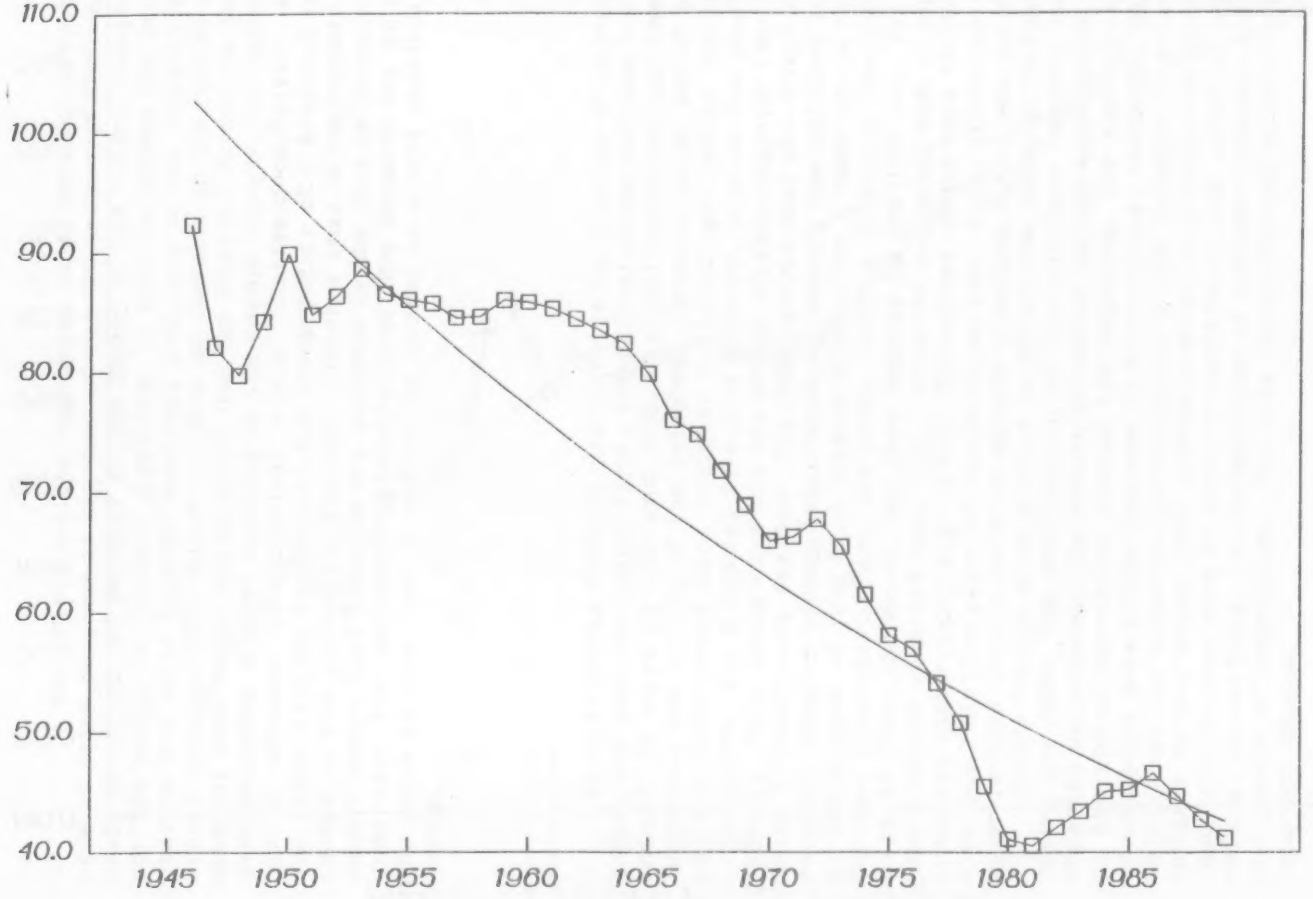
Others factors were at work to effect the price of telephone services during the 1980s. The profitability of the telephone industry including both reported earnings and the return-of-capital through depreciation was greater at the end of the period then at the beginning. The higher rate of profit would absorb some of the increase in productivity. (Although, it needs to be noted that the apparent productivity of the industry in prior years was inflated to the extent that a deterioration in earnings was underway.) Thus, important factors were at work, in addition to the impact of access charge reform, divestiture, the deregulation of customer premises equipment, and the growth of competition. The data report the net effect of all of these important changes.

Chart 1(a)


"Real" Telephone Prices
1929 to 1989
140.0
130.0
120.0
110.0
100.0
90.0
80.0
70.0
60.0
50.0
40.0
1928
1933
1938
1943
1948
1953
1958
1963
1968
1973
1978
1983
1988
TPI
regression (-1.7%)

"Real" Telephone Prices

1946 to 1989



Simple Model
Years: 1930-1989
trend: -1.7% regression line based
on the CPI Telephone service index

Regression Output:

Constant		0	
Std Err of Y Est		0.021962	
R Squared		0.727174	
No. of Observations		60	
Degrees of Freedom		57	
X Coefficient(s)	0.025500	-0.64147	-0.33925
Std Err of Coef.	0.003660	0.067752	0.089530
t	6.97	-9.47	-3.79

Simple Model
Years: 1946-1989
trend: -2% trend line starting 1945

Regression Output:

Constant		0	
Std Err of Y Est		0.023851	
R Squared		0.655867	
No. of Observations		44	
Degrees of Freedom		41	
	constant	dCPI	d2CPI
X Coefficient(s)	0.028771	-0.63473	-0.45270
Std Err of Coef.	0.006053	0.107777	0.127867
t statistic	4.75	-5.89	-3.54

Lagged Inflation Model of Telephone Service Price Changes

This chart describes a lagged inflation model of telephone service price changes. The model uses historical changes in inflation and demand to predict year to year changes in telephone service prices. The model demonstrates that from 1929 to the present, telephone service price changes followed changes in overall inflation and interest rates, and that telephone service prices were inversely related to changes in telephone demand. The analysis also suggests that there may have been anomalous telephone service price increases just following divestiture, but that these were primarily due to indexing problems, and that the overall pattern of rate changes from 1984 to 1989 was consistent with trends observed since 1929.

Regression analysis was used to model the relationship between telephone service rates, inflation, and demand. The dependent variable is the year to year percentage change in the Consumer Prices Index (CPI) for all telephone service. This index is now published monthly by the Bureau of Labor Statistics (BLS), and represents changes in the amounts paid by households for both local and toll services. Annual averages of the index values are available from 1935 through 1989.

The CPI telephone service index was modified to remove the effects of changes in federal excise taxes (FET) on telephone services. The CPI telephone index measures changes in the costs of telephone service to consumers. Changes in FET rates therefore result in changes in the CPI telephone service index. Statutory tax rates, FET collections, and revenue data were used to remove the effects of changes in FET rates from the CPI telephone service index. FET rates rose rapidly during World War II, fell in the early 1950s, and then gradually declined in the 1970s. Adjusting the series for FET changes has almost no effect on the long term trend. There was no FET in the early 1930s, and the rate is 3 percent today, but does not apply to some items covered by the CPI telephone service index.

A second adjustment was made to extend the series back to 1929. The Bureau of Economic Analysis publishes an annual index of telephone service rates as part of its series of personal consumption expenditure fixed weight price indexes. This index is continuous from 1929 through 1989, and is based on CPI data. The annual changes from 1935 to the present are almost identical to annual changes in the CPI telephone service index. Accordingly, year to year changes from 1929 to 1935 were used to extend the CPI series back to 1929.

Telephone service rate changes tend to lag changes in inflation and demand. These changes in telephone rates lag changes in general inflation because capital costs accumulate over time, labor contracts are negotiated at intervals, and because regulatory oversight of the rate making process

introduces delays. Changes in inflation are also associated with changes in interest rates, which in turn effect the carrier's cost of capital. Embedded cost of debt changes gradually, and changes in the cost of equity translate into rate changes after regulatory delay. The cost of providing telephone service is related to the level of demand for telephone services. Carriers have large amounts of fixed investment. In the short term, increases in demand for services result in fixed costs being spread over a larger service base, reducing cost of service per unit of service. This can result in lower rates. In the longer term, increased growth permits carriers to invest in modern and more efficient equipment. These factors suggest that rate changes resulting from changes in inflation and demand would occur over a number of years, with little or no effect in the immediate year, substantial effect for the next few years, and decreasing effect thereafter.

Inflation and demand variables have been constructed to capture lag effects over a period of years. The data series were smoothed so that the observation for time period t was calculated as the weighed average of the variable for the six years prior to year t. The independent variable for period t was then calculated as the percentage change in the smoothed series from period t-1 to period t. The weights for smoothing the data were calculated using a log normal distribution with the coefficients Mean = 1.1 and variance = .8, with the resulting coefficients normalized to sum to 1. The resulting weights imply no effect in the immediate year, substantial effect for the next few years, and decreasing effect thereafter. All variables were calculated with the same weighting scheme, which is illustrated below:

$$\text{SmoothData}(t) = .232 * \text{DATA}(t-1) + .262 * \text{DATA}(t-2) + .199 * \text{DATA}(t-3) + .140 * \text{DATA}(t-4) + .098 * \text{DATA}(t-5) + .069 * \text{DATA}(t-6)$$

$$\text{Variable}(t) = [\ \text{SmoothData}(t) / \text{SmoothData}(t-1)\ ] - 1$$

The CPI all items index for urban consumers (CPI-U) was used as the measure of overall inflation. It is a broader measure of inflation than Producer Price Index all commodities series, and is available from 1913 to the present. Other measures of inflation are not available before 1929.

Interest rates, which often move with inflation, also have a strong effect on telephone rates. Carrier cost of embedded debt gradually changes in response to interest rate changes, and the cost of long term debt is a reasonable indicator of the cost of equity. The YIELD variable was constructed using the annual yields of Moody's Aaa bonds.

Demand for telephone service generally moves with changes in the overall economy. Changes in real (constant dollar) Gross National Product (GNP) were used as one surrogate for changes in demand. Real GNP estimates are available from the Bureau of Economic Analysis for 1909 to the present.

The second demand variable is based on changes in the number of toll messages. Toll message data is reported in Statistics of Communications Common Carriers for 1926 to 1983. The Monitoring reports contain estimates of toll messages for 1980 through 1988. The two series were linked in 1981 to provide a measure of toll demand, identified in the model as the TRAFFIC variable. Toll message data for 1922 through 1926 were obtained from Historical Statistics of the United States: Colonial Times to 1957, US Department of Commerce.

The regression was run for 1930 to 1989. The R squared is .745. Graph 3(c) shows the residuals of the regression. This graph illustrates the relatively close fit between the model and actual changes in telephone prices. Table 1 shows the coefficients and the t statistics for each of the variables. All variables are correctly signed, and are statistically significant at the 98% confidence level. The model is not sensitive to specification of the variables. A simple average of 4 lag years, for example, produces an R squared of .67 and similar coefficients.

TABLE 1
Model Coefficients and t Statistics

Variable	Coefficient	t Statistic*
Constant	.014	4.313
CPI	.714	9.020
YIELD	.180	4.095
GNP	-.135	2.313
TRAFFIC	-.222	3.696

* Absolute values are shown for t statistics.

The model was used to test whether changes in telephone prices since divestiture were systematically different from changes before divestiture. Several factors could have resulted in unusual increases in the CPI telephone service index just after divestiture. Primer and Sourcebook on Telephone Price Indexes and Rate Levels, April 1987, provides a description of three possible problems in the CPI telephone service index for 1984 through 1986. The first resulted from index adjustments made at divestiture to reflect the

unbundling of customer premises equipment and inside wiring. For this purpose, the BLS assumes that each customer would subscribe to inside wiring maintenance, would use the telephone company to install new inside wiring, and would continue to lease telephone sets. These chaining assumptions result in a one time jump of about 11% in the CPI local service index, and about 7 percent in the CPI telephone service indexes just after divestiture. Since a great many customers do not subscribe to inside wiring maintenance, install their own inside wiring, and own their own telephones, the CPI telephone service index probably overstates the increase in the cost of telephone service just after divestiture.

In addition to the CPI index for local service, the BLS publishes a producer price index (PPI) of local resident service. This index does not cover installation charges, and stopped covering leased equipment before divestiture. The index was chained at divestiture to reflect the unbundling of inside wiring maintenance. The BLS assumed that a lower quality service, access service without inside wiring maintenance, was being offered at the same price. The BLS estimated the value of this quality difference as the change in telephone cost. This change was then imputed as a price increase. The PPI residential service index rose 4% just after divestiture, compared with the 11% increase for the CPI local service index. This difference is due to sample differences, and differences in chaining procedures.

Another indexing problem resulted from the implementation of the subscriber line charges (SLCs). BLS includes SLCs as part of the cost of local exchange service. Thus, the implementation of SLCs, and the offsetting interstate message toll service rate reductions, resulted in increases in the CPI local service index, and and decreases in interstate toll index. These indexes are combined in the CPI telephone service index. The introduction of SLCs should have resulted in roughly offsetting changes in the CPI local and CPI interstate indexes, with little net effect on the CPI telephone service index for 1984 through 1986. At that time, however, the CPI telephone service indexes used weights based on consumer usage patterns from the early 1970's. Toll calling has greatly increased since the 1970s. The CPI telephone service index would have been about 1 percent lower in December 1986 if the BLS has used weights based on 1982 through 1984 interstate toll usage patterns, and even lower if more current usage weights were used. The BLS introduced new CPI weights in 1987.

An additional weighting problem resulted from the treatment of leased telephones. Through 1986, all monthly service quotes in the CPI local service sample included the leased cost of one or more telephones. Most residential equipment was customer owned, and not leased by that time. As a consequence, a large jump in AT&T's equipment lease rates resulted in a 1.7 percent jump in the CPI telephone service index in early 1986.

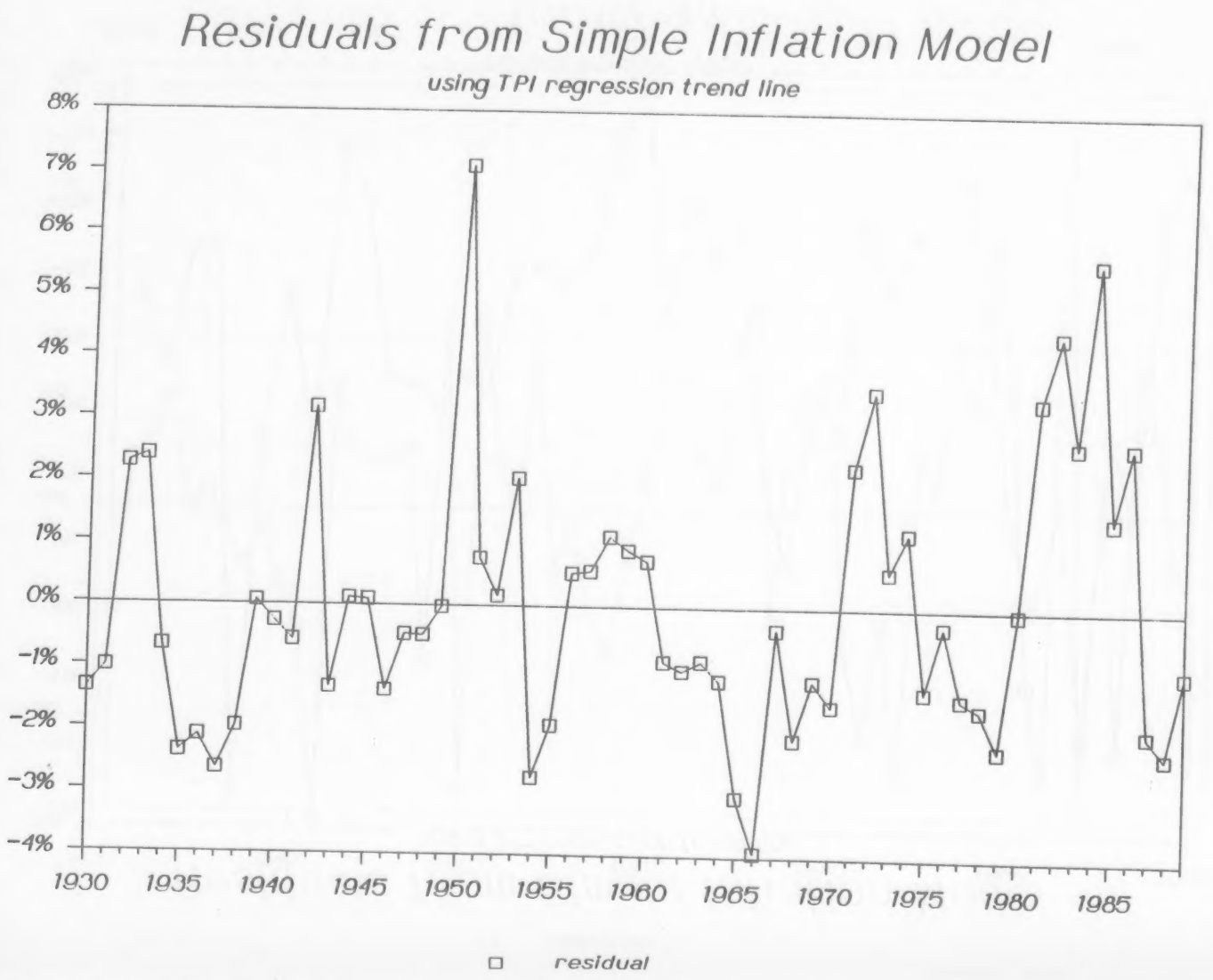
It is possible that the CPI telephone service index in the years immediately after divestiture include one time cost increases resulting from the mechanics of divestiture and the conversion to equal access. Various

parties have suggested that local exchange productivity has either accelerated or declined in recent years for other reasons.

The preceding factors suggest that there may have been anomalous increases in the CPI for telephone service for 1984 through 1986. This was tested by using a dummy variable for these years. The resulting regression has an R squared of .762. The dummy variable has the expected sign, and is statistically significant, with a t statistic of 2.007. The coefficient has a value of .018, indicating that the CPI telephone service index rose about six percent more for 1984 through 1986 than would be expected based on changes in inflation and demand. Much of this amount is due to the CPI methodology, rather than a change in the relationship of rates, inflation, and demand. It should be noted, however, that a six percent deviation over three years is not unusual given that the standard error of the estimates is one and a half percent.

Dummy variables for the whole post divestiture period, and for 1987 through 1989, were not statistically significant. This suggests that changes in telephone rates in recent years have been consistent with historic relationships between rates, inflation and demand, and that changes in the relationship since divestiture were at most fleeting and small. It should be noted that the model does not incorporate changes in carrier profitability. Thus an increase in post-divestiture productivity may have contributed to short run increases in carrier profits, rather than to significantly lower service rates.

Chart 3(a)


Residuals from Simple Inflation Model
using TPI regression trend line
8%
7%
6%
5%
4%
3%
2%
1%
0%
-1%
-2%
-3%
-4%
1930
1935
1940
1945
1950
1955
1960
1965
1970
1975
1980
1985
residual

Residuals from Simple Inflation Model

using TPI regression trend line

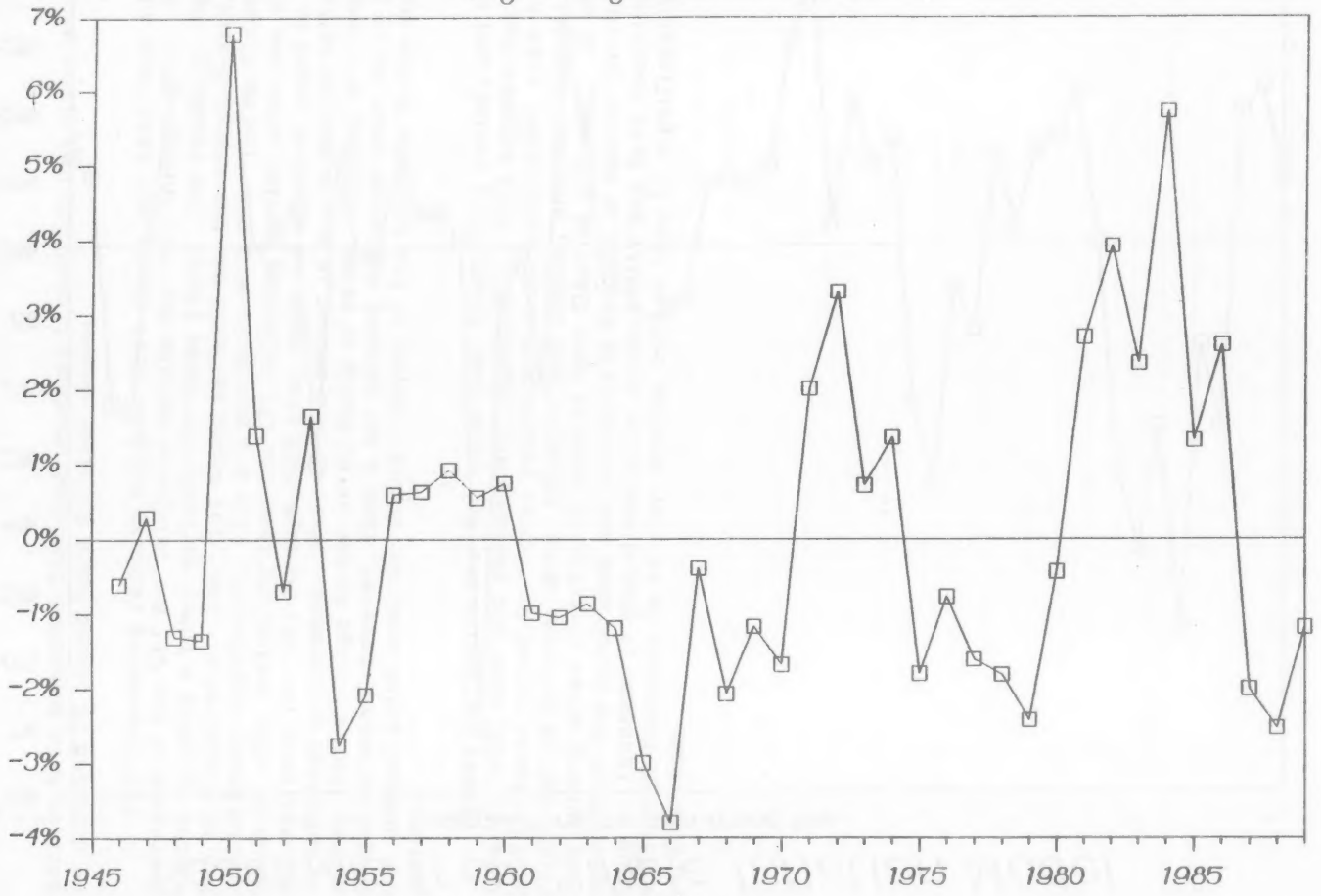


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Chart 3(c)

Residuals

Lagged Inflation Model

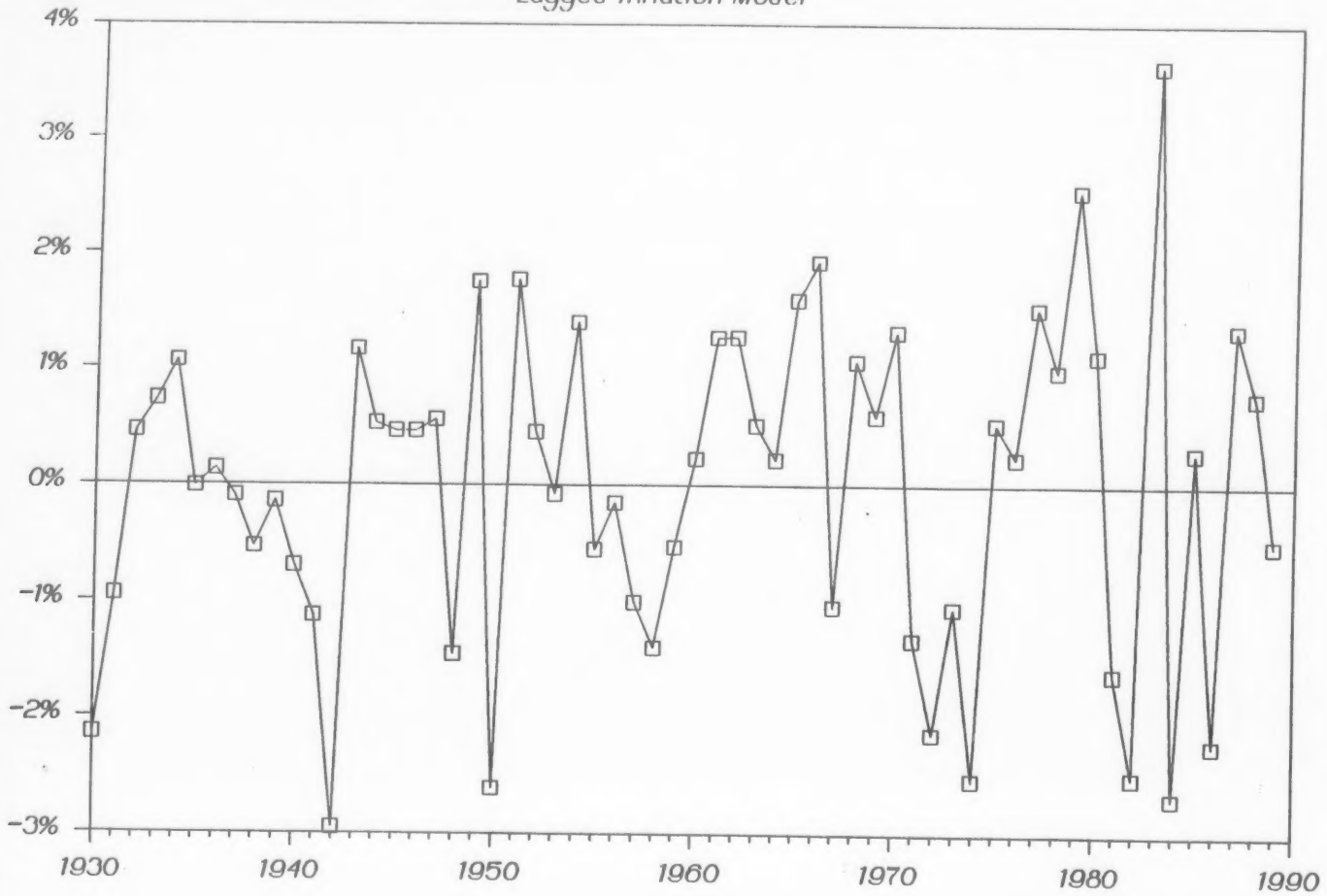

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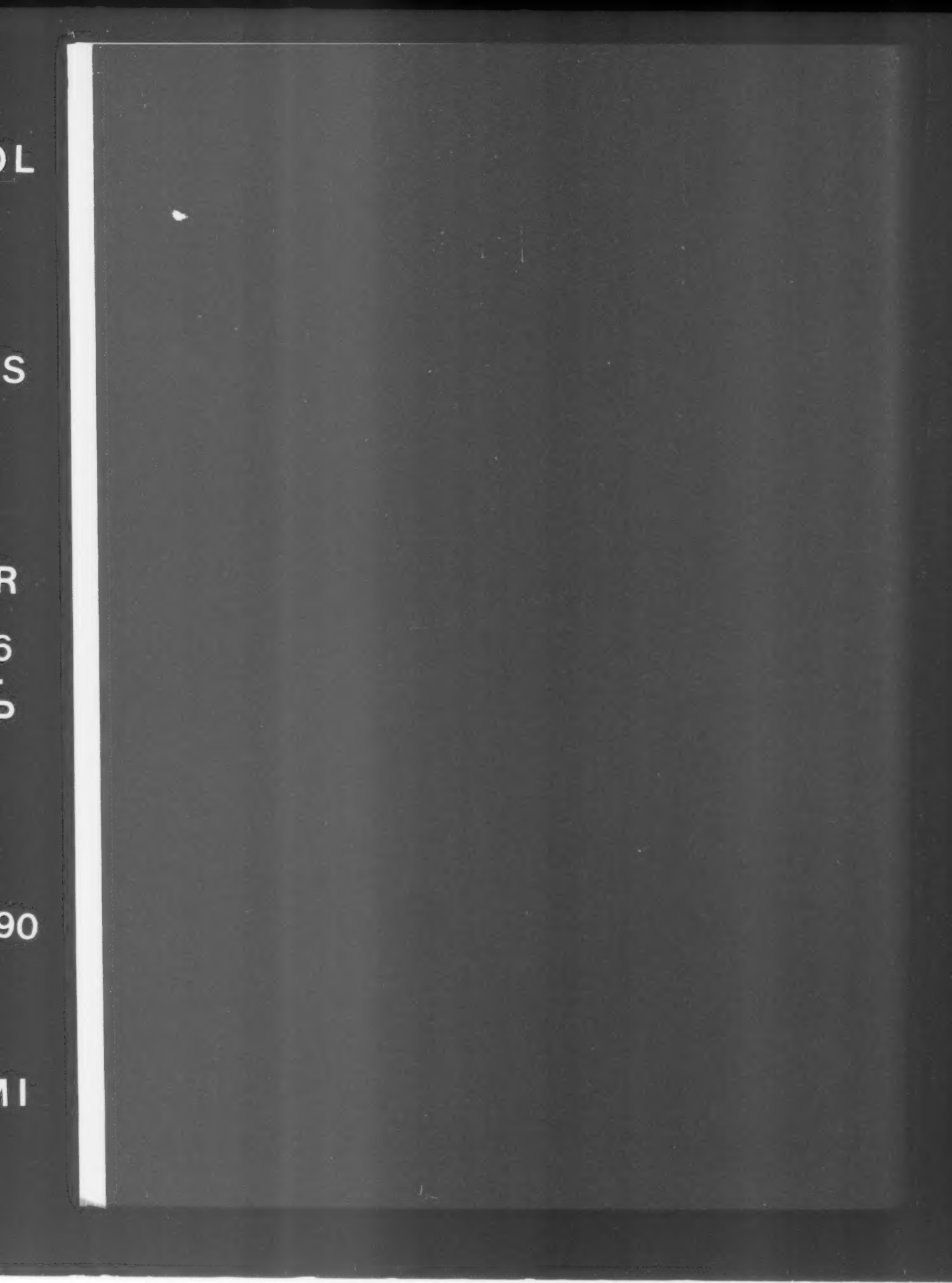
Chart 3(b)

Residuals from Simple Inflation Model